

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF NEBRASKA

3           MICHAEL S. ARGENYI,           )  
  )  
4                   Plaintiff,           )           8:09CV341  
  )  
5                   vs.                   )           Omaha, Nebraska  
  )           August 30, 2013  
6           CREIGHTON UNIVERSITY,       )  
  )  
7                   Defendant.           )

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10                   VOLUME VII  
                  TRANSCRIPT OF PROCEEDINGS  
11                   BEFORE THE HONORABLE LAURIE SMITH CAMP  
                  CHIEF UNITED STATES DISTRICT JUDGE AND A JURY  
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A-P-P-E-A-R-A-N-C-E-S

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1 (At 9:12 a.m. on August 30, 2013, with counsel for the  
2 parties, the plaintiff, and the defendant's representative  
3 present, and the jury NOT present, the following proceedings  
4 were had:)

5 THE COURT: Good morning. Ms. Frahm -- Ms. Frahm?

6 I had asked her to let the jury know it's going to be at  
7 least ten minutes before we're ready for them so they can be  
8 at ease for that period of time.

9 For the record, yesterday we had met in chambers for a  
10 couple of hours -- at least it seemed that way -- at the end  
11 of the afternoon. I had provided the lawyers with a draft of  
12 jury instructions and a draft of a verdict form that we had  
13 prepared after reviewing the proposed jury instructions and  
14 verdict forms submitted by both sides, as well as the  
15 objections submitted by both sides.

16 And after a pretty thorough discussion in chambers, a  
17 number of changes were made to the Court's draft of the jury  
18 instructions and of the verdict form. And then a new copy of  
19 each was provided to both lawyers this morning shortly after  
20 eight o'clock. So you've had about an hour to review the most  
21 recent draft by the Court of the jury instructions and the  
22 verdict form.

23 And at this time, we will go on the record with the  
24 objections of counsel to the jury instructions and verdict  
25 form. And I will start with counsel for the plaintiff,

1 Ms. Vargas.

2 MS. VARGAS: Thank you, your Honor.

3 I would ask the Court's direction on the appropriate  
4 moment to address plaintiff's motion for directed verdict.

5 THE COURT: And thank you for reminding me on that.

6 I think it would be appropriate to do it right now  
7 actually before I take the objections to the instructions and  
8 the verdict form. So you may proceed with your motion.

9 MS. VARGAS: Thank you, your Honor.

10 The plaintiff moves for a motion for a directed verdict  
11 at the rest of the defendant's case.

12 Plaintiff is required to establish it's more likely true  
13 than not that Creighton University failed to provide the  
14 auxiliary aids and services that were necessary to ensure  
15 effective communication.

16 And Creighton has utterly failed to offer any evidence to  
17 respond to what amounts to a mountain of evidence from  
18 plaintiff that he did, in fact, need auxiliary aids and  
19 services in his medical education and the services he needed  
20 were exactly the ones he requested.

21 Specifically with reference to the M1 year, the first  
22 year of medical school, Creighton's own witnesses conceded  
23 that the FM system was not effective. The only other  
24 auxiliary aids and services, if you can call it that, that was  
25 offered was access to podcasts, which were audio only with no

1 captioning. So obviously Mr. Argenyi was unable to understand  
2 those.

3 And of course, he was offered to access classes through  
4 another student. So another student would get to attend  
5 classes and take notes and he would get access to their notes  
6 but not to the actual medical education.

7 And so while we move for a directed verdict with respect  
8 to the entire range of the plaintiff's claims, we in  
9 particular draw the Court's attention to that M1 year where  
10 there really is no dispute that there was not effective  
11 communication in the medical education that Mr. Argenyi was  
12 entitled to receive.

13 Also with respect to the second year, we believe we're  
14 entitled to a directed verdict for many of the same reasons.  
15 The offer of an oral sign-supported interpreter only in large  
16 lectures and limited number of didactic labs was a very  
17 deliberate effort to provide exactly what Creighton knew  
18 Mr. Argenyi didn't need and exactly what wouldn't be effective  
19 for him. And no decision could be more deliberate than the  
20 decision to not -- to deny him interpreters in the clinic even  
21 if he paid for those interpreters himself.

22 And so the defendant has certainly not met its burden  
23 with respect to undue burden. And the plaintiff has, I think,  
24 repeatedly objected to the fact that the defendant has been  
25 allowed to assert the defense of undue burden after it had

1       stated unequivocally in an admission of a party-opponent  
2       signed by counsel for Creighton University that it was not  
3       asserting entitlement to undue burden with respect to the  
4       provision of interpreter services without qualification.

5             And so we believe that's not hearsay, it falls within the  
6       exception to the hearsay rules. We believe it's an admission  
7       of a party-opponent.

8             And based on that, not only has undue burden not been  
9       proved, but it shouldn't even have been asserted with respect  
10      to the claims in the first place.

11            And so on that basis, we ask for a directed verdict at  
12      this time.

13            THE COURT: And your motion obviously is preserved  
14      for the record. I won't request response from defense  
15      counsel. I think that there are sufficient issues to have the  
16      matter go to the jury in this case. And so it will proceed to  
17      go to the jury.

18            And the motion is denied.

19            We'll now turn to the jury instructions. And I will hear  
20      the plaintiff's objections to the jury instructions.

21            MS. VARGAS: Would your Honor like to proceed going  
22      instruction by instruction or only those broad issues where we  
23      have objection?

24            THE COURT: Only those instructions to which you have  
25      an objection.

1 MS. VARGAS: Thank you, your Honor.

2 And really, they are relatively small. They fall into  
3 two categories only, one of which is incredibly important --  
4 really both of which are important.

5 One, again is the issue I just referenced a moment ago  
6 with respect to undue burden, that we don't believe that  
7 defendant should be entitled to assert that defense without  
8 limitation when it's failed to supplement its discovery  
9 responses which are viewed as judicial admissions that no  
10 evidence can be offered to contradict.

11 In addition, the specific instruction on undue burden  
12 does not include the language -- it includes only part of the  
13 language of the regulation. It doesn't include the language  
14 contained in 28 CFR 36.303(g) where it says not only must  
15 defendant prove entitlement to assert undue burden --

16 THE COURT: I suspect someone may be wearing a  
17 hearing aid and -- very good. We got it.

18 Thank you.

19 MS. VARGAS: I'm sorry, your Honor.

20 I was discussing undue burden and the fact that the undue  
21 burden instruction -- I believe that's found on page 16,  
22 yes -- that in addition to the fact that, as I've stated  
23 multiple times, we don't believe it is properly asserted in  
24 this case. As currently written, it excludes the critical  
25 language in the regulation that even if the defendant were to

1 be correct that providing the auxiliary aids and services  
2 requested would amount to an undue burden, it still has an  
3 obligation to provide auxiliary aids and services that are  
4 necessary to ensure effective communication pursuant to the  
5 ADA to the extent -- to the maximum extent possible without  
6 incurring an undue burden. And that is the exact language of  
7 the ADA regulation.

8 Of course, this case is also filed pursuant to 504. 504  
9 regulation, Rehabilitation Act regulations, don't contain any  
10 undue burden language at all. And so certainly with respect  
11 to the Section 504 claim, we would object that this  
12 instruction includes a claim that's not included in the  
13 regulations at all.

14 THE COURT: All right. And specifically, the  
15 objection is to instruction number 13; is that correct?

16 MS. VARGAS: Yes, your Honor.

17 THE COURT: All right. And just to recap some of the  
18 discussion that we had on this issue yesterday, part of which  
19 was at sidebar, there was evidence adduced that Creighton had  
20 waived its defense of undue burden with respect to providing  
21 interpreters.

22 And I had noted that that evidence is before the jury and  
23 plaintiff's counsel can certainly argue that in the closing  
24 argument. But I did not find that Creighton had completely  
25 waived its defense of undue burden.

1           So the objection to instruction 13 is denied.

2           MS. VARGAS: Your Honor, the only other issue is more  
3 of a global concern, and I can point out each place where it  
4 appears.

5           But, this case is filed pursuant to two federal laws.  
6 It's filed pursuant to the ADA, of course, and also the  
7 Rehabilitation Act. These two laws have different language of  
8 what the standard is that defendant is obligated to provide to  
9 students with disabilities.

10          And with respect to Section 504 of the Rehabilitation  
11 Act, that standard is meaningful access, which is included in  
12 these instructions. However, what's not included in these  
13 instructions is the ADA language, which is important.

14          And that language provides Mr. Argenyi with an  
15 opportunity for full and equal enjoyment. And so the  
16 plaintiff would specifically object in instruction 7,  
17 instruction 9, instruction 10 and instruction 11 where the ADA  
18 standard of full and equal enjoyment is not mentioned at all  
19 in the instructions.

20          THE COURT: And that issue was discussed at length  
21 yesterday in chambers and was given careful consideration by  
22 the Court.

23          I had concluded that to use the specific language -- and  
24 I want to quote it exactly -- but referring to enjoyment, full  
25 enjoyment, could be misleading in the context of a medical

1 school education. I think that the term full enjoyment is  
2 more applicable to situations involving entertainment. I  
3 think it's more applicable to going to the theater, going to a  
4 restaurant, going to a swimming pool where a member of the  
5 public is seeking enjoyment.

6 I think in a medical school context, what Mr. Argenyi was  
7 seeking was equal access to an education, to the benefit of  
8 the education that Creighton was offering. And so that's why  
9 I chose that language in these instructions, referring to the  
10 benefit of the educational opportunity. That's what he was  
11 seeking. He wasn't going there for fun.

12 And I think the term enjoyment, in the context of this  
13 case, would be misleading. So I just want to assure you I  
14 gave your proposal careful consideration and deliberation. I  
15 recognize that it is the language that exists in that statute.  
16 But I found it to be misleading in the context of the facts of  
17 this case. And that's why I selected the specific language I  
18 selected.

19 MS. VARGAS: Your Honor, I recognize the Court's  
20 careful consideration of this issue. And I would suggest, as  
21 an alternative, to track and respect the language of the law  
22 that's at issue in this case, as an alternative to use full  
23 and equal access.

24 THE COURT: And let me mark down exactly which  
25 instructions you're referring to so that it's clear for the

1 record which instructions are affected by your specific  
2 objection.

3 MS. VARGAS: Your Honor, I believe it's  
4 instruction 7.

5 THE COURT: All right. And I'll just note in  
6 instruction 7, I really thought I was going with the language  
7 that the plaintiff requested there because the defendants  
8 wanted to include "reasonable accommodation" in that  
9 instruction, and the plaintiff's focus in the discussion in  
10 chambers was to keep instruction 7 limited to necessary  
11 auxiliary aids and services.

12 And so I specifically focused in instruction number 7 on  
13 the defendant's proposed language on necessary auxiliary aids  
14 and services which you said was all that the plaintiff needed  
15 to prove at that particular juncture. And I took out the  
16 language that the defendants so adamantly wanted, and I'm sure  
17 we'll hear about that in a moment, about reasonable  
18 accommodations.

19 MS. VARGAS: Your Honor, you're correct, I misspoke.

20 THE COURT: Okay.

21 MS. VARGAS: I withdraw my objection to number 7, the  
22 language isn't in there. I do see it on page 12, which is  
23 instruction number 9, where it says, "individuals with  
24 disabilities to provide such individuals with meaningful  
25 access to the educational benefits offered by Creighton." So

1 the plaintiff would ask that it read instead, individuals with  
2 disabilities to provide such individuals with meaningful  
3 access or -- meaningful and full and equal access to the  
4 educational benefits offered by Creighton University.

5 THE COURT: Okay.

6 MS. VARGAS: And then again in instruction 10 and 11.

7 THE COURT: Your objection is noted and it is denied.  
8 I will stay with the language indicating that Creighton had an  
9 obligation to provide the plaintiff with meaningful access to  
10 the educational benefits offered by Creighton.

11 And I believe that there is other language in there also  
12 describing what "meaningful access" means. Yes. In  
13 instruction 10, it describes what meaningful access means,  
14 that Creighton was required to give the plaintiff an equal  
15 opportunity to gain the same benefit.

16 So while we can always debate and disagree about how many  
17 more adjectives should be added, as I discussed in chambers,  
18 my objective is to keep the instructions clear, concise, and  
19 readable for the jury. And I think that this does that. And  
20 therefore, your objection is denied.

21 MS. VARGAS: Thank you, your Honor.

22 We have no further objections to the jury instructions as  
23 drafted by the Court.

24 THE COURT: Any objection to the verdict form?

25 MS. VARGAS: No, your Honor.

1 THE COURT: Very good. Thank you.

2 And we will hear now from defense counsel with the  
3 defendant's objections to the instructions and the verdict  
4 form.

5 MS. BALUS: Thank you, your Honor.

6 Starting with instruction number 7, as you surmised, we  
7 would like the language in there on the third element to say  
8 -- where it starts with provide, to say "provide reasonable  
9 and necessary accommodation and/or auxiliary aids and  
10 services".

11 Number one, I think it's clear and it has been clear from  
12 the evidence in this case that what Mr. Argenyi was asking for  
13 was a reasonable accommodation. In Plaintiff's Exhibit No. 1,  
14 which started this whole process, he asked for an  
15 accommodation from the medical school's technical standards in  
16 receiving these auxiliary aids and services. So he checked a  
17 box that said, "Yes, I do require accommodation."

18 Number two, I believe the Court's opening instructions  
19 referred to accommodations. I think that word has been used  
20 throughout this case. And I think it could be confusing to  
21 the jury now to not have those referenced anywhere in the  
22 closing instruction.

23 And number three and most importantly, I think that  
24 language is consistent with the Eighth Circuit's opinion in  
25 this case. The court said in directing this case to be

1 remanded, and what it found to be the issue, it said, "We  
2 conclude that the evidence produced in this case created a  
3 genuine issue of material fact as to whether Creighton denied  
4 Argenyi an equal opportunity to gain the same benefit from  
5 medical school as his nondisabled peers by refusing to provide  
6 his requested accommodations." That was the conclusion to  
7 their opinion.

8 THE COURT: And I'll just note at this juncture, you  
9 can make whatever objections you want to make for the order,  
10 I'm not going to stop you. But I did hear all of the  
11 arguments in chambers.

12 And you're going to be making your arguments to the jury  
13 here pretty soon. Right now we're just really preserving your  
14 objections for the record. So you don't need to try to  
15 persuade me again of your positions because I heard the  
16 argument, I absorbed the arguments, I considered your  
17 arguments. And you lost on these points.

18 So right now, you're just really preserving them for the  
19 record. But if you feel the need to say more, that's fine.

20 Go ahead.

21 MS. BALUS: I appreciate it, your Honor. Just to  
22 give you a little bit of background, I've been involved in a  
23 case before where -- and thankfully it was the other side was  
24 found by the Eighth Circuit to not have preserved their  
25 argument because they didn't make their argument with

1 specificity.

2 THE COURT: Okay.

3 MS. BALUS: So if the Court would indulge me a little  
4 bit, I want to make sure I preserve my record.

5 THE COURT: I will.

6 MS. BALUS: Okay. In addition, the Eighth Circuit  
7 also referred to "reasonable auxiliary aids and services"  
8 twice in their opinion at least, once at page 449 and once at  
9 page 450. So we think adding both "accommodation" and  
10 "reasonable" to that instruction is appropriate.

11 THE COURT: And I'll just note because I want you to  
12 understand part of the process I went through in concluding  
13 that I was not going to add that language in this particular  
14 instruction, I did find the plaintiff's argument persuasive  
15 that including the term "reasonable" in instruction number 7  
16 would tend to blur the burdens of proof; and that the  
17 reasonableness of the accommodations requested by Mr. Argenyi  
18 went more to the issue of undue burden; and that in  
19 instruction number 7, we should focus on whether or not  
20 Mr. Argenyi proved that the auxiliary aids and services  
21 provided by Creighton did not provide him with access to the  
22 information. So that's why the term "reasonable" was taken  
23 out of this particular instruction.

24 Regarding "accommodations", I accepted the plaintiff's  
25 argument that the plaintiff in his complaint was seeking

1 auxiliary aids and services, and he was focused on that  
2 narrower issue, not focused on broader accommodations. So  
3 that's why I did what I did on 7.

4 Go ahead.

5 MS. BALUS: We have the same issues with the second  
6 to the last sentence on page 9 of instruction 7 where it  
7 starts, "Therefore," it had "necessary auxiliary aids and  
8 services," we'd ask that the same phrase, "reasonable and  
9 necessary accommodation and/or service -- auxiliary aids and  
10 services" be inserted for the same reasons.

11 On instruction 8, same issue with the first sentence  
12 where it says "necessary auxiliary aids and services" for the  
13 same reasons.

14 On instruction 9, at the very last sentence on page 11,  
15 again it says "provide necessary auxiliary aids and services,"  
16 we'd want the same language added for the same reasons.

17 On instruction 10, in the first sentence, same language  
18 for the same reasons.

19 On the second sentence, same language for the same  
20 reasons.

21 At the beginning of the third paragraph, same language  
22 for the same reasons.

23 And then we would like to add from defendant's proposed  
24 instruction 18, which is page 25 of filing number 324, the  
25 language that said, unlike Title II of the ADA that applies to

1 state and local governments, Title III of the ADA which  
2 applies to public accommodations like Creighton University  
3 does not require defendant to give "primary consideration" to  
4 the specific request of the person with a hearing impairment.

5 I assume you want me to continue or did you want to --

6 THE COURT: You can keep going.

7 MS. BALUS: Okay.

8 On instruction number 13, which is on page 16, we have  
9 the same objection to the first sentence where it says  
10 "provide necessary auxiliary aids and services". We would  
11 like to add the same language for the same reasons.

12 And then we would also like to add the language from --  
13 this was our proposed instruction on undue burden -- to say  
14 one way defendant can prove an undue burden is if the  
15 accommodations and auxiliary aids and services requested by  
16 plaintiff are excessive in relation either to the benefits of  
17 the accommodation or to defendant's financial survival or  
18 health. This language is taken from the *Vande Zande vs.*  
19 *Wisconsin Department Administration*, 44 F.3d 538, Seventh  
20 Circuit 1995.

21 I recognize that this is an employment case, but Title I  
22 and Title III regulations use the exact same factors in  
23 determining whether there was an undue burden, so we think  
24 that's appropriate to Title III cases as well.

25 And then one of the things I noted that changed from the

1 Court's previous instruction -- and I know plaintiffs had a  
2 problem with, in two different places in the instructions, it  
3 saying you must find for Creighton University. And I  
4 understand why they wanted to take that language out.

5 So now the instruction doesn't tell the jury what they  
6 should do if they find Creighton meets its burden. So I would  
7 prefer either that language be put back in, or as an  
8 alternative, somewhere in here it says: If Mr. Argenyi has  
9 met his burden of proving what it says in the first sentence,  
10 and Creighton has met -- has not met its burden in proving  
11 undue burden, then you must find for Mr. Argenyi.

12 Instruction number 14, we would ask that the word  
13 "reasonable" be added back in, in addition to the word  
14 "necessary" for the same reasons I've already mentioned with  
15 respect to the Eighth Circuit's opinion.

16 Number 15, we would ask that the definition of deliberate  
17 indifference from defendant's proposed instruction number 23  
18 which was page 31 of filing 324 that included the plainly  
19 obvious language from *AP versus Anoka-Hennepin Independent*  
20 *School District No. 11*, 538 F.Supp.2d 1125 District of  
21 Minnesota 2008.

22 We'd also like to add back in the language that was in  
23 the Court's original proposed instruction that talked about  
24 negligence or inadvertence not constituting deliberate  
25 indifference from model civil jury instruction from the Eighth

1 Circuit 4.23, or some language from defendant's proposed  
2 instructions that talks about intermediate level of  
3 culpability, which comes from the *Folkerts vs. City of Waverly*  
4 case, 707 F.3d 975, which is an Eighth Circuit 2013 case; or,  
5 deliberate indifference is akin to criminal recklessness or  
6 requires something more than mere negligent conduct, which is  
7 from *Drake v. Koss*, 445 F.3d 1038, Eighth Circuit 2006.

8 On instruction 16, we would ask that the word  
9 "accommodations" be added where it says "as a direct result of  
10 Creighton's failure to grant," so it would be "grant the  
11 accommodations and/or auxiliary aids and services he  
12 requested" for the same reasons I've already explained.

13 And then finally, we would ask -- there were some of  
14 defendant's proposed instructions that weren't included, so  
15 we'd like to preserve our record on those as well.

16 We would ask that our proposed instruction number 19 on  
17 reasonable -- the definition of reasonable be added which was  
18 page 26 of filing 324. We'd ask that proposed instruction  
19 number 22 on academic deference be added, which was page 30 of  
20 filing 324. We'd ask that defendant 's proposed instruction  
21 number 25 on the treatment of students with disabilities, page  
22 33 of filing 324; and defendant's proposed instruction number  
23 26 on educational institutions/nonprofit corporate party, page  
24 34 of filing 324, those all be added.

25 THE COURT: All right.

1 MS. BALUS: Thank you, your Honor.

2 THE COURT: Your objections are preserved for the  
3 record. They are denied.

4 And I believe that some of the concerns raised are  
5 adequately handled by the verdict form. Do you have any  
6 objection to the verdict form?

7 MS. BALUS: No objection to the verdict form.

8 THE COURT: All right. And also just for the record,  
9 the parties' objections to each others' proposed jury  
10 instructions and proposed verdict forms are denied as moot.

11 Now, is there anything else we need to talk about before  
12 the jury comes in to hear closing arguments?

13 One thing I will ask if plaintiff's counsel is aware of  
14 our local rule regarding the fact that counsel can't use more  
15 than one half the time that was used in the initial closing  
16 argument for rebuttal. In other words, if you have an hour,  
17 you can devote 40 minutes to the initial part of your argument  
18 and then save 20 for rebuttal. But if you only use 10 minutes  
19 for your initial part of the argument, you're only going to  
20 have three and a third minutes for your rebuttal. Does that  
21 make sense?

22 MS. VARGAS: There was some discussion of this, your  
23 Honor. Thank you for bringing it to my attention, I  
24 appreciate that.

25 There was some discussion of this before we went on the

1 record with some of the court staff. And I just want to  
2 clarify, Mr. Moore had requested that the parties have an hour  
3 for closing. And I understood something different from the  
4 court staff with respect to time, and perhaps if I didn't use  
5 all 40 minutes in closing, that I wouldn't be entitled to any.

6 THE COURT: No, not at all.

7 MS. VARGAS: So I wanted to clarify that it is as you  
8 just explained, and that I would have one-third; is that  
9 correct, of whatever time used for rebuttal?

10 THE COURT: Right. You don't waive your rebuttal.  
11 The local rule is set up just so that most of what you have to  
12 say comes in at the beginning so that defense counsel has an  
13 opportunity to address that, rather than saving most of your  
14 time for the rebuttal.

15 So, generally what a lawyer would do in your  
16 circumstances, given an hour, is you might reserve 20 minutes  
17 for your rebuttal. You don't have to, you could use your full  
18 hour at the beginning if you wanted to. But you can't reserve  
19 more than 20 minutes for your rebuttal.

20 MS. VARGAS: Thank you, your Honor. I appreciate the  
21 Court's attention to this matter. And at this time, we would  
22 like to plan for 40 minutes for closing and 20 minutes for  
23 rebuttal time.

24 THE COURT: Very good.

25 MS. VARGAS: Thank you.

1 THE COURT: And if you wanted to let Ms. Frahm know  
2 when you want your yellow light to go on, how much of a  
3 warning you want, that's also something you can communicate to  
4 her.

5 Okay. You're probably way ahead of me on that.

6 MR. MOORE: I'm just going to use a timer up there.  
7 I won't be able to see back there.

8 THE COURT: Very good. Anything else before we bring  
9 in the jury?

10 MS. VARGAS: No, your Honor.

11 MR. MOORE: A couple things from the defendant, your  
12 Honor.

13 First of all, because this came up again with the  
14 objection to the requests for production, the documents and  
15 the admission, the allegation of waiver and that request for  
16 production did not come in, obviously Dr. Kavan testified with  
17 regard to what the undue burden was for interpreters and what  
18 Creighton was and was not claiming.

19 We just want to make sure that discovery disputes and  
20 those discovery issues may not be raised in closing arguments.  
21 That's the first issue.

22 And then the second issue is very quickly, we just want  
23 to know do you call us back before the jury reads its verdict?

24 THE COURT: And those are all good questions.

25 Regarding closing argument, I would expect the lawyers to

1 base their closing argument on the law as is set out in the  
2 jury instructions and on the evidence that came in during the  
3 trial.

4 So it's true that reference to pretrial matters, whether  
5 it's pretrial motions or discovery or other things that didn't  
6 come in during the presentation of the evidence, would be  
7 inappropriate to bring up at the time of the closing  
8 arguments.

9 In civil cases, the lawyers aren't required to be here.  
10 The parties aren't required to be here when the jury brings in  
11 its verdict. But if you wish to be here, you're very welcome  
12 to be. And we will be happy to notify you.

13 One thing we do require though is if you want to be here  
14 when the jury brings in its verdict, we need you to stay  
15 within a 15-minute radius of the courthouse because I just  
16 don't want to keep the jury waiting when somebody has gone off  
17 to, you know, west Omaha.

18 MR. MOORE: That's still ten minutes away.

19 MS. VARGAS: I obviously don't want to speak for the  
20 defendant, as for the plaintiff we most certainly want to be  
21 present when the verdict is read. And we will stay within  
22 that radius.

23 MR. MOORE: Same for the defendant.

24 THE COURT: Very good. Then you'll just want to make  
25 sure you leave Ms. Frahm with a telephone number where you can

1 be reached.

2 MR. MOORE: Very good.

3 THE COURT: I will also, of course, let you know if  
4 we have any jury questions, which is often the case. And then  
5 we'll get you on the line to talk about the proposed response  
6 to the jury questions.

7 One other matter I'll bring up is obviously we'll be  
8 having a mid-morning break at some point in time. And the  
9 logical time would appear to be after the plaintiff's closing  
10 argument.

11 MS. VARGAS: Your Honor, I would request that -- the  
12 jury has been cooling its heels for some time. And in order  
13 for things to proceed expeditiously and also in fairness to  
14 both parties, that both closing arguments proceed  
15 uninterrupted without any break.

16 THE COURT: If that's your request, I'll honor that  
17 request. But then what I'm going to do is -- the jury has  
18 been sitting in there waiting for us. And as a courtesy to  
19 them, I'm going to let them know that they will be listening  
20 to two hours of argument and they need to be prepared to sit  
21 here for two hours.

22 And so we're going to start at ten o'clock with the  
23 closing arguments, and we're going to keep running until noon.  
24 And that way they'll have an opportunity to take a bathroom  
25 break before they come in here. Otherwise, somebody is going

1 to have an issue.

2 Okay. We'll start at 10. Thank you.

3 (Recess taken at 9:50 a.m.)

4 (At 10:10 a.m. on August 30, 2013, with counsel for the  
5 parties, the plaintiff, and the defendant's representative  
6 present, and the jury NOT present, the following proceedings  
7 were had:)

8 THE COURT: Ms. Frahm, please bring in the jury.

9 (Jury in at 10:11 a.m.)

10 THE COURT: Please be seated. Good morning.

11 Once again thank you very much for your patience. We  
12 have been in here working on the jury instructions, and they  
13 are now in final form.

14 You will have copies of these -- in fact, let's just go  
15 ahead and hand them out at this point in time and that way you  
16 can read along with me silently on your part as I go through  
17 these instructions. And then we'll be hearing the closing  
18 arguments of counsel.

19 (Instructions 1 through 17 read.)

20 THE COURT: Now, I'm going to wait to read  
21 instruction number 18 until after the closing arguments  
22 because it gives you more specific information about what  
23 you're supposed to do when you actually go into the jury room  
24 to begin your deliberations.

25 But if you'll take a moment and turn back to instruction

1 number 5, that's where I was missing the section number. And  
2 does everyone there have a pencil or close access to a pencil?  
3 Looks like you do.

4 Where it starts with paragraph number 1 that says  
5 "Creighton is a place of public accommodation for purposes of  
6 Title III of the Americans with Disabilities Act, 42 USC --  
7 please insert section mark 12181 through -- and then you can  
8 put a dash -- 12189. And that's simply a reference to the  
9 law. So it should be included there for that purpose, not  
10 that we expect you to look up the law; in fact, we don't.

11 Now, at this point in time, we are going to hear closing  
12 argument, beginning with counsel for the plaintiff.

13 And Ms. Vargas, will you be presenting the closing?

14 MS. VARGAS: Yes, your Honor, I will.

15 THE COURT: Very good. You may proceed?

16 MS. VARGAS: Thank you, your Honor.

17 Good morning.

18 So the white coat ceremony marks the beginning of medical  
19 education in almost every medical school in the United States.  
20 It's a symbolic beginning of medical education. It represents  
21 the student having worked really hard and achieved the  
22 opportunity to be admitted to medical school.

23 It's also, more importantly, the first time when a  
24 student steps up on the stage and puts on their white coat,  
25 and they do that in front of their family and their friends.

1 And it's a really big deal.

2 This is how it began for Michael Argenyi at Creighton  
3 University. And if I may --

4 MR. MOORE: This is not in evidence, your Honor.

5 THE COURT: I understand it's not in evidence. I  
6 expect it's a picture of Michael; is that correct? I will not  
7 require you to take it down. If you want it up there, I'll  
8 let you leave it up there.

9 MS. VARGAS: Thank you, your Honor.

10 And so, in August of 2009, Michael put on the white coat  
11 in front of his family and his friends. And he stood with his  
12 classmates, eager to learn and ready to work hard and prove  
13 himself worthy.

14 That day when Michael first put on his white coat was a  
15 day of hope for him. He was proud to be accepted at Creighton  
16 University. He believed that he was entering a university  
17 where every person would be treated with dignity; where every  
18 person would be valued.

19 But even that first day, there were signs; signs that  
20 Creighton might not be what it promised.

21 Five months before that day when Michael put on his white  
22 coat for the first time, he did what he'd done at every other  
23 community college and university he had ever attended. He  
24 requested the auxiliary aids and services that he needed to  
25 access his education. He requested captioning, which is

1 sometimes called CART; and he requested oral sign support  
2 interpreters.

3 He provided an audiogram, a document that he was really  
4 deaf, the nature of his disability. And when Creighton asked  
5 for more documentation, he complied. He complied willingly.  
6 He provided letter after letter after letter from his treating  
7 specialist, Dr. Backous, and from his treating audiologist of  
8 many years, Stacey Watson.

9 He provided a reference from his former supervisor. And  
10 when Creighton denied his request for the captioning and the  
11 interpreters, and instead offered an FM system, Michael agreed  
12 to give it a wholehearted try, and he did.

13 Was he worried? You bet he was. Because when he first  
14 asked for auxiliary aids and services, Dr. Kavan told him that  
15 his admission to Creighton University School of Medicine was  
16 now conditional. That was the exact word, "conditional".

17 He was afraid he was about to be kicked out of medical  
18 school at any moment. And perhaps, looking back now, that  
19 would have been the kinder course of action for Creighton  
20 University to take. Instead, Creighton took his tuition and  
21 advised him to think carefully whether he was qualified to be  
22 a medical student.

23 He was worried because he and his treating specialists,  
24 Dr. Backous and Stacey Watson, had told Creighton that he'd  
25 never used an FM system before to understand speech. He had

1       only tried the FM system to locate sound, where sound was  
2       coming from.

3               And while he hoped that an FM system could -- and that  
4       word is important -- could be helpful in knowing where sound  
5       was coming from in a small group, if it was maybe less than  
6       eight people, in a quiet place, and people weren't moving  
7       around, he was concerned -- rightfully so -- that he wouldn't  
8       be able to understand the words. And isn't education all  
9       about the words?

10              Nevertheless, he met with his audiologist. He found out  
11       what FM system could plug into the cochlear implant that he  
12       had had surgically implanted in his head. He provided that  
13       information to Creighton respectfully, professionally. He was  
14       in contact with Mr. Chuck Lenosky, who you heard from  
15       yesterday, making sure that he had the information that was  
16       necessary for the FM system to have its best chance of  
17       working.

18              In other words, he did everything that was asked of him  
19       willingly. But that day when he arrived for his white coat  
20       ceremony, you heard yesterday from Mr. Lenosky that the FM  
21       system wasn't even installed yet; no captioning, no  
22       interpreters, no FM system; just Michael.

23              Having paid nearly \$50,000 in tuition for his first year  
24       of medical school alone, knowing that in medical school there  
25       are no do-overs, you can't take the class over again, Michael

1 asked to meet with the folks at Creighton. They brought their  
2 general counsel, Amy Bones, who has not testified in this  
3 matter.

4 And you heard testimony that she, the lawyer for  
5 Creighton University at the time, told Michael -- and Dianne  
6 DeLair -- that Michael might not be qualified to be a medical  
7 student at Creighton University, at this moment, when he had  
8 picked up his entire life and moved to Omaha to start medical  
9 school.

10 You've heard testimony that his advocate said Michael  
11 wanted Creighton University to provide the auxiliary aids and  
12 services he'd requested. And you know what? That's the  
13 truth. He did want them to provide the auxiliary aids and  
14 services he had requested; not because it was some extra  
15 benefit, not because he was trying to gain some competitive  
16 advantage over anybody else; but because he knew that he  
17 needed them to understand the education that is the service  
18 Creighton University offers to its students, the service for  
19 which he paid dearly.

20 That meeting didn't go well. I think the parties can  
21 agree on that.

22 Nevertheless, Mr. Argenyi went with professionalism, with  
23 willingness, to school. He didn't complain. You didn't hear  
24 any testimony that he complained, that he went to his  
25 professors and complained about what had happened and what was

1 going on.

2 What you heard was he went to class and he tried to hear,  
3 every day for almost three weeks. He went to class and he  
4 tried to hear for hours a day, for days a week, for almost  
5 three weeks.

6 And I ask you, how long does it take you to know when you  
7 can't hear something? Does it take three weeks? Does it take  
8 even five minutes? Or do you really know that you can't hear  
9 something when you can't hear it? And how do you really  
10 explain that to somebody else?

11 I think a good example of a tiny little bit of what  
12 Mr. Argenyi was experiencing was actually the OSCE videos, the  
13 selected ones that weren't accidentally destroyed that you got  
14 to see. Remember how they were loud and you could hear the  
15 words, but it was really hard to understand them. It was  
16 really hard to listen and know what all those words were.  
17 There was distortion. It wasn't a simple thing. You had to  
18 concentrate.

19 That's a little bit, just a little taste of what it was  
20 like for him every day, all day long, in the most complex of  
21 settings, medical school terminology.

22 So, he tried to do the impossible, right? He tried to  
23 hear. He tried to understand. He tried to lip-read; lip-read  
24 words like gangliosidosis hexosaminidase, lipofuscinosis,  
25 metachromatic leukodystrophy. Not one at a time, but in a

1 blur, all together, in a two-story lecture hall with 126  
2 people typing on their computers and taking notes. And he  
3 couldn't hear. He couldn't hear.

4 Creighton doesn't want to talk about what happened next.  
5 On September 1st, Michael Argenyi, as you know, sent an e-mail  
6 describing the fact that he was missing decent chunks of  
7 lectures that he couldn't hear, that he was unable to  
8 concentrate for so long to try and find the words that were  
9 hidden in all that static.

10 And Creighton offered the testimony of its own employees;  
11 nobody else, its own employees; who said, well, there's this  
12 one word or this one phrase in this letter that was sent a few  
13 months ago. And if we only just put that little word on the  
14 screen and we black out everything else and take it out of  
15 context, then maybe we don't have to actually comply with the  
16 law; maybe we don't actually have to admit that Michael was  
17 right all along, that he couldn't understand.

18 And what we ask you to do is to look at all the evidence  
19 and to find the truth that is there. Look at all of the  
20 letters, the ones beginning from his very first request in  
21 March when he was asking for the obvious. He didn't know it  
22 would be complicated because he's deaf; because it's obvious  
23 that he can't hear. And so that's what he asked for.

24 He asked what he'd used at every other school that he  
25 attended. He didn't know that their lawyers were going to be

1 looking for a word here and a word there to try and catch him  
2 to try and prove that somehow he wasn't deaf enough.

3 Look at all the evidence from his first request, right  
4 through the spring of 2009, through his wholehearted try. But  
5 don't stop there, where Creighton draws a line and tries to  
6 put its head in the sand and hope that you won't pay attention  
7 to what is obvious to you, to them, and to everyone in this  
8 courtroom, that he couldn't understand. And he didn't tell  
9 them once or twice; he didn't just say it out of court to  
10 somebody. He told them every way he could over and over and  
11 over again, in e-mail after e-mail after e-mail. You sat for  
12 two weeks looking at these e-mails and letters.

13 How often do doctors write even one letter for a patient?  
14 And yet this young man's doctors wrote not once or twice or  
15 three times, they wrote four times. And they said, "Michael  
16 remains to be deaf regardless whether he is or is not using  
17 his cochlear implants." Michael's need for captioning and  
18 interpreters in the appropriate settings that were described  
19 over and over and over again, in lectures, small groups,  
20 clinics, they said the need was imperative.

21 And I only know that one word, it only has one meaning;  
22 imperative means he needed it a lot. There's no other meaning  
23 for that one word.

24 But don't even look at just that one word; look at  
25 everything. Look what happened after he set foot on campus

1 after he told them again and again and again, please, I can't  
2 understand, I'm missing lectures, I'm missing labs. I can't  
3 understand.

4 I'd like to show you -- or perhaps you can just pull out  
5 your verdict form that Judge Smith Camp has given to you  
6 because it's really important that you follow through the  
7 instructions that the Court has laid out exactly as they're  
8 written.

9 THE COURT: Ms. Vargas, I don't think I've provided  
10 the verdict form as yet because we only send one verdict form  
11 back with the jury at the time they go in for their  
12 deliberations. They don't have that in front of them. But  
13 there is no problem with you showing that to them. If you  
14 wish to put it on the overhead, that would be fine.

15 MS. VARGAS: May I?

16 THE COURT: Go ahead.

17 MS. VARGAS: Thank you.

18 So, if you look at question one, that's where you start.  
19 And this form is essentially your roadmap to work through all  
20 of the instructions. The first question is whether Michael  
21 proved it was more likely than not that Creighton University  
22 violated the ADA and Section 504.

23 And if you look at the instructions that the Court has  
24 given you, what you're being asked to decide is whether  
25 Creighton University failed to provide auxiliary aids and

1 services that were necessary to ensure effective  
2 communication.

3 And I hope -- boy, we haven't done our job over the past  
4 two weeks if that's not an easy question for you.

5 In the first year of medical school, Creighton offered an  
6 FM system. Creighton offered that Michael could not have  
7 direct access to the lectures, but could have the notes of  
8 another student, a hearing student who had the opportunity to  
9 go into the classroom and get the information firsthand.

10 And Michael tried the FM system, he tried it for a long  
11 time. He tried it until he was certain that he couldn't do it  
12 anymore.

13 And Creighton, despite all of his e-mails explaining,  
14 begging, asking for access to the education that Creighton had  
15 promised to provide him, Creighton responded by assigning  
16 Dr. Knoop to follow him. To follow him. That's not something  
17 they do for any other student. That doesn't help him. That  
18 doesn't allow him to hear what happens in class.

19 They assigned Dr. Knoop to follow him every single day,  
20 to every single lecture. And you can look at those records  
21 which have been admitted into evidence and see that Creighton  
22 knew exactly where Michael was, exactly what he needed to  
23 communicate. And they did nothing.

24 And for the rest of that year, they say, oh, we had no  
25 idea, he didn't provide enough documentation.

1 But you heard testimony from Dr. Thedinger.  
2 Dr. Thedinger, whose first job was working at Creighton  
3 University; Dr. Thedinger here in Omaha, who defense counsel,  
4 along with other folks from Creighton University, went to; not  
5 at the end of the first year of medical school, but in  
6 February, a little more than halfway through the year. And  
7 they told him, "There's this student at Creighton with  
8 cochlear implants and he's having trouble, he's struggling, he  
9 can't understand in the classroom."

10 There was only one student with cochlear implants at  
11 Creighton University School of Medicine who was struggling in  
12 the classroom. And Dr. Thedinger, remember what he said. He  
13 said, "There's testing you can do. Is he deaf? You can test  
14 his hearing, you can test the FM system."

15 And what's interesting is that Creighton and its lawyers,  
16 they never went back to Dr. Thedinger. It was Michael who had  
17 already paid to access health care with his own doctors, who  
18 didn't need to go get another opinion, who didn't need to pay  
19 for another appointment, he already knew he was deaf. It was  
20 Michael who went to Dr. Thedinger and said, "Please, test my  
21 hearing."

22 And he did. And you know what he proved? Dr. Thedinger,  
23 who had no interest in supporting one side or the other, who  
24 was just looking for the truth, he's an expert. I think he  
25 testified that he was listed as one of the best doctors in

1 America. He testified that he wrote a letter which you've  
2 seen; and that when he tested that FM system that Michael said  
3 wasn't working, when he tested it, that that FM system, it  
4 actually made his hearing worse.

5 Imagine that. He could understand 38 percent of basic  
6 speech in a sound booth with the FM system. No wonder he  
7 couldn't understand the medical school lectures. And  
8 Creighton admitted it. You heard Dr. Kavan on the stand admit  
9 that that was not effective communication.

10 They knew Michael couldn't hear. They knew he couldn't  
11 understand. They knew day to day to day that he was  
12 fulfilling the promise that they made to the federal  
13 government when they chose to accept our tax dollars, federal  
14 funds. Michael was paying for his own auxiliary aids and  
15 services. And they knew it, and they sat back and watched.

16 When you look at the evidence with respect to this first  
17 question of whether Creighton failed to provide auxiliary aids  
18 and services that were necessary for Michael to access a  
19 medical education, consider who testified.

20 Michael offered all of the letters he ever sent Creighton  
21 University. He testified himself. He offered full and  
22 complete access to his doctor, to his audiologist. He  
23 provided the information for other deaf doctors, for other  
24 medical schools that educated deaf medical students. He  
25 wasn't in this to be a pioneer. He wanted to be a doctor.

1 And there are lots of other deaf doctors. You met one of  
2 them.

3 Look at Michael's past use of auxiliary aids and services  
4 at other universities. Look at his actual experience once he  
5 got to Creighton, once he tried the FM system. Has defendant  
6 offered any evidence at all that he could hear and understand  
7 these lectures, its labs, its clinics? Did you hear any  
8 evidence? Did they have an expert?

9 It's a school full of doctors. It's a school that has  
10 accepted federal funding to cure deafness. There are experts  
11 in that school. And Dr. Kavan sat back and said, "Well, we  
12 need more documentation. I don't know how to read an  
13 audiogram."

14 He couldn't have walked down the hall and asked one of  
15 those experts? He couldn't have found a single doctor  
16 anywhere in the entire medical school who could read an  
17 audiogram?

18 Instead, the evidence that Creighton offered was about  
19 something that we don't dispute: Michael can sometimes  
20 communicate by himself. Sometimes when the lighting is good,  
21 and the context is quiet, when the speaker is familiar, or  
22 when the conversation is conversational and he can seek  
23 clarification, when it's not complex terminology, when it's  
24 not really, really important like whether somebody has an  
25 allergy to a medicine, whether somebody is having a symptom

1       that's in her head or in their elbow or in their leg.

2               And so the fact that Michael could sometimes understand,  
3       he doesn't dispute that. He's talking about the times he  
4       couldn't understand. And I'd ask you to look very carefully  
5       whether Creighton has offered any evidence about those times.

6               And I would suggest that both Dr. Kavan with respect to  
7       the first year of medical school and Dr. Hansen with respect  
8       to the second year of medical school, they admitted on the  
9       stand that the communication he had was not effective. That's  
10      the first question.

11              I would also just point out Creighton offered people who  
12      are on its payroll. That's it. While some of that testimony  
13      is certainly relevant -- I'm not suggesting it isn't -- I do  
14      think it's important to look and see if there's anyone who has  
15      not received a paycheck from Creighton University who has  
16      gotten up on that stand to support them.

17              Let me say something else. Does it really make sense  
18      that a medical student who wants to be a doctor, who wants to  
19      be able to go to his professors, to the faculty at the school  
20      of medicine, to get a letter of recommendation so that some  
21      day he can get a good residency, does it make sense that he  
22      would borrow \$111,000 for something he doesn't need and then  
23      file suit against his medical school? Does that make sense?

24              In opening statement Mr. Moore said that Creighton  
25      University believes in Michael, that they believed he'd make a

1 good doctor, that they wanted what was best for him.

2 And I'd ask you to review in your mind what you saw when  
3 Michael was on the stand trying to explain that in some  
4 situations he can communicate okay, and in other situations he  
5 can't. And I want you to ask yourselves if Creighton and its  
6 counsel treated Michael in the way that you think the  
7 university would treat a student they believed in, a student  
8 they were proud of, a student they wanted the best for.

9 Is that what you saw?

10 Turning to the second question, the question is -- well,  
11 let me go back. It's our burden to prove it's more likely  
12 than not that Creighton failed to provide necessary auxiliary  
13 aids and services. That's our burden.

14 When it comes to number 2, the Court has instructed you  
15 that that is Creighton's burden; that Creighton must prove  
16 it's more likely than not that providing the auxiliary aids  
17 and services that were necessary would have resulted in an  
18 undue burden.

19 You heard testimony that Creighton University generates  
20 \$400 million in revenue each year. You heard testimony and  
21 it's been stipulated to the parties how much Michael Argenyi  
22 paid for auxiliary aids and services.

23 And I'm just going to -- with permission of the Court --  
24 walk over to the notepad, and I won't have a microphone over  
25 there so I'm just going to put some numbers up there on that

1 notepad for you.

2 THE COURT: You may.

3 MR. MOORE: Your Honor, may we have permission to  
4 move over so we can see it?

5 THE COURT: You may.

6 MR. MOORE: Thank you.

7 MS. VARGAS: When you consider undue burden, you need  
8 to look at the overall financial resources of the defendant,  
9 Creighton University, as well as the resources of the medical  
10 school.

11 We know from testimony of the vice president of finance  
12 and from the evidence you'll have in a binder you will receive  
13 from the Court that Creighton University had more than \$400  
14 million in revenue. And it's hard to wrap your mind around  
15 what that means to a real human being.

16 And so what I've done on that notepad is I've crossed  
17 out, I think, four zeros. So, Creighton University, \$400  
18 million in revenues. Let's compare -- and Michael Argenyi  
19 paid \$51,000 for one year of his auxiliary aids and services.

20 If we compare \$400 million to a person with an annual  
21 salary of \$40,000, just by dropping the zeros, and you drop  
22 the same number of placeholders from the \$51,000 cost of the  
23 auxiliary aids and services, what you get is that the person  
24 who makes the salary of \$40,000 a year, that would be like  
25 asking them to pay \$5.10. That's a sandwich and maybe, maybe

1 a cup of coffee.

2 And for that, four years and two weeks in this courtroom.

3 And remember, you heard Dr. Kavan testify yesterday that  
4 providing interpreters was not an undue burden.

5 You have evidence in the binder you'll receive from the  
6 Court that the captioning that worked for Michael, that  
7 allowed him access to all of the important words that the  
8 other students could hear, that that cost \$75 an hour.

9 What do interpreters cost in a lecture setting? You saw  
10 Dr. Moreland testify. How many interpreters did he have?  
11 Interpreters cost \$40 an hour. Two interpreters are required  
12 for a lecture setting. It's complex terminology. That means  
13 \$80 an hour.

14 So why would Creighton pay more for something Mr. Argenyi  
15 was saying didn't work when he had already successfully used  
16 something that did, that actually cost less?

17 The third question on the verdict form will simply ask --  
18 so there are no mistakes -- who would you vote for; who won?  
19 Is it Michael or is it Creighton? Hopefully that will be an  
20 easy one.

21 The fourth question, plaintiff bears the burden of  
22 proving it's more likely than not that Creighton intentionally  
23 discriminated. And there's a jury instruction which the Court  
24 has provided and you should follow exactly what the Court said  
25 to do. It doesn't require ill will. It requires that they

1 acted with deliberate indifference to Michael's federally  
2 protected civil rights.

3 They knew. They knew he couldn't hear. They knew he  
4 couldn't understand. They talked to their lawyers. And boy,  
5 they changed what they offered after that first year. Oh,  
6 it's Dr. Thedinger's letter. That was four months before,  
7 that didn't change their minds because they didn't have him do  
8 any testing. But now that they had the letter, that changed  
9 their minds. That's what they said.

10 And, they very carefully and very deliberately offered  
11 exactly the auxiliary aids and services that they knew  
12 wouldn't work. They chose deliberately.

13 Dr. Hansen, I asked him a few different ways to make sure  
14 it was clear, to make sure I understood. And I hope you  
15 remember he said it was deliberate, it was a choice that they  
16 made.

17 And what they chose was even though captioning was what  
18 he'd always used, what he used successfully in his first year  
19 paying for it himself, even though it cost less, they chose to  
20 provide something that Michael said was not effective. And he  
21 provided reasons why. And they deliberately chose to offer  
22 what he didn't ask for.

23 And when it came to the labs, and he said in that  
24 setting, the labs where there's a lot of lecture, I still need  
25 captioning. But if the labs are moving around and we're

1 learning how to do certain kinds of procedures, then I can  
2 seek clarification and the terminology isn't quite so  
3 complicated in that setting, an oral interpreter will work.

4 And of course, did they provide the oral interpreter in  
5 that setting? They did not. Instead, what they did was they  
6 looked at exactly what wouldn't work.

7 They offered him the privilege of having his professor  
8 stand next to him. They offered him the privilege of having a  
9 seat next to the professor. If he's sitting next to someone,  
10 do you think he could read their lips? If the professor is  
11 writing on the board, do you think he could read their lips?  
12 Even if the words weren't so complicated, even if every sound  
13 could be seen on the lips -- which we've heard testimony isn't  
14 the case -- that was a deliberate choice.

15 And the worst part of what they did, the very worst part  
16 was then they said for the clinic, for the clinic you can't  
17 have interpreters, even if you pay for them yourself.

18 It wasn't about cost. That was about very carefully  
19 choosing to offer not what Michael needed. And they have the  
20 nerve to say that they were offering him help, special  
21 benefits; sitting next to the professor; being ordered to sit  
22 in the front row in front of 126 of his peers, being told to  
23 sit in the front row with his girl. That was the special  
24 privilege they were offering him.

25 And so, it's important when you think about whether they

1       acted deliberately to think about what they knew. And they  
2       knew a lot.

3             Let me show you the letters -- and you will have all of  
4       these in your binder of evidence. And again, we want you to  
5       look at all of them, not just a highlighted line here and  
6       there on the screen.

7             THE COURT: Ms. Vargas, you're welcome to continue  
8       with your closing at this point, we just need to reset the  
9       clock.

10            MS. VARGAS: Thank you.

11            They've told you that he didn't provide enough  
12       documentation. What else could he have provided? What else?

13            And wasn't it an important moment when Dr. Hansen  
14       admitted on the stand that he had testified in deposition that  
15       there was no amount of documentation Michael could provide  
16       that would change their minds. That was the truth. There's  
17       no amount of information he could provide.

18            It was like a game of Open Sesame except the trick to  
19       their game was that there was no magic word. There's nothing  
20       he could say. They weren't going to provide it. They didn't  
21       provide it. They did it on purpose.

22            The last question, and it's an important one, but I need  
23       to move kind of quickly. The last question you'll be asked is  
24       what amount you would award Michael in damages. And you'll be  
25       asked about direct damages and other damages. And the jury

1 instructions will explain this to you, and you should follow  
2 exactly what they say.

3 Today Michael carries approximately \$130,000 in loans  
4 from the first two years of his medical education from tuition  
5 with the increasing interest every day. Michael carries loans  
6 which, as a social work student, he is trying to pay back on a  
7 monthly basis, in the amount of roughly \$111,000.

8 That's roughly \$241,000 in debt for his two years at  
9 Creighton University. You may decide that \$241,000 is the  
10 appropriate measure of direct damages.

11 When it comes to the other category of damages, the  
12 damages that are for humiliation, embarrassment, emotional  
13 pain and suffering; for that you need to rely on your own  
14 judgment and decide what a fair and just measure of damages  
15 would be. That's up to you.

16 We would suggest that given what this young man went  
17 through every single day for two years, every single day, we  
18 would suggest that an appropriate measure might be taking that  
19 \$241,000 and multiplying it by 3. And that would bring you to  
20 \$723,000.

21 But it's up to you to choose whether you think that is  
22 just. It could be that you think more is just, it could be  
23 that you think less is just. You will rely on your own  
24 judgment. And of course, follow strictly the instructions of  
25 the Court.

1           My husband and I have three boys at home. So that means  
2           in our house, there's a lot of discussion of being brave and  
3           having courage, all those kinds of things. And my husband, of  
4           course, being a guy, says -- I don't know if this is from  
5           Superman or what, but he says in order to be brave, in order  
6           to have courage, you have to first be afraid.

7           He was.

8           And I say, because I'm the mom and moms see it  
9           differently, it's a quote that I've always told them: Courage  
10          doesn't always roar. Sometimes courage is the quiet voice at  
11          the end of the day that says, "I will try again tomorrow."

12          And he did that every day. Every day.

13                 THE COURT: Thank you, Ms. Vargas.

14          And as you take your seat, if you would please take down  
15          the photo and then turn the flip chart to a clean page, I'd  
16          appreciate that. Thank you.

17          And we will now here the closing argument from defense.  
18          And Mr. Moore, you may proceed.

19                 MR. MOORE: Thank you, your Honor. I can't see the  
20          timer, so I was going to put a timer right in front of me  
21          here, if I may.

22                 THE COURT: You may.

23                 MR. MOORE: Your Honor, counsel, ladies and gentlemen  
24          of the jury, Michael wants what Michael wants. Two days  
25          before he even stepped into a medical school classroom, that's

1       what his lawyer said. Michael wants what Michael wants.

2               Now folks, you also heard Mr. Argenyi say that on  
3       August 12th, 2009, before he even stepped into medical school,  
4       that he knew at that time what Creighton offered was not  
5       enough. And if Creighton didn't provide him everything he  
6       demanded, it wasn't enough.

7               Now, as we said in opening, I think as you saw,  
8       Mr. Argenyi's a smart guy. Creighton believes that, we  
9       believe that. It's no question he's a smart guy. And he  
10      wants to maximize his educational results.

11              And he's used to, as he's clearly said, going to a  
12      college and saying, "Here's what I want," and the college  
13      gives it to him. He believed he was entitled to it. And he  
14      believed Creighton should do the same thing, that he shouldn't  
15      have to provide any documentation.

16              I have a disability. You've got to give me whatever I  
17      want.

18              But that's simply not the standard the law requires. But  
19      he went farther than that, folks. He sat on this stand and he  
20      told you that he's the only one who knows what effective  
21      communication is for him.

22              When I asked him, as you recall, about the Dr. Backous  
23      and Stacey Watson letters, I asked him, "How did those  
24      recommendations for CART and FM system get into those  
25      letters?" He said, "because I told them." And I said, "Do

1       you think you're the only one that knows?" And he said, "Yes,  
2       I'm the one with the hearing impairment, I'm the only one that  
3       knows."

4               Even assuming that's a standard -- which it can't be and  
5       which the law tells you in your jury instructions that it's  
6       not -- he doesn't even know what's effective communication.

7               Why do I say that? Because he wasn't even willing to try  
8       what Creighton offered. How do we know he wasn't willing to  
9       try? Because when I asked him, "Do you really believe that  
10      you gave it a wholehearted try," he couldn't even keep a  
11      straight face. You saw him. He smiled. And I said, "Sir,  
12      you're smiling. Are you sure you really believe that's a  
13      wholehearted try?" And he continued to smile and said,  
14      "Yeah."

15              He even knows it wasn't a wholehearted try. In fact, he  
16      testified before he even stepped into a medical school  
17      classroom, he knew what Creighton was offering was not enough  
18      and he wasn't willing to try.

19              For M2, what did we hear? For M2, first day of class,  
20      Creighton provided an oral interpreter which he himself said  
21      was interchangeable with CART, oral interpreter that he'd  
22      actually used in the past, Victoria Deuel on multiple  
23      occasions. Creighton offered that.

24              Mr. Argenyi sat on that stand and said, "Yeah, I really  
25      tried, I was looking at her but I really didn't understand so

1 I had to look at CART. And after the class ended, I went down  
2 and I told her, you know, it's not working and she asked if  
3 she should leave."

4 Folks, that's not true. Victoria Deuel, who is not  
5 employed by Creighton University, does not receive a paycheck  
6 from Creighton University, like Ms. Vargas said, doesn't have  
7 a stake in this case, we subpoenaed her to come in for one  
8 purpose, to come in and tell you what happened that day. And  
9 what did she say? "I tried to sign and he wouldn't look at  
10 me. Not only would he not look at me, he said, 'I'm not going  
11 to look at you. You might as well leave.'"

12 He wasn't even willing to try. I've always got CART.  
13 I'm used to getting CART. I'm entitled to CART. I'm not  
14 going to try what you're offering. Despite the fact that he  
15 admitted that no one ever asked him in his whole life is it  
16 necessary? Is it appropriate? No one, ever. He was offended  
17 when Creighton did.

18 How can he sit on that stand and tell you that Creighton  
19 has to pay \$110,000 for these auxiliary aids and services when  
20 he won't even try what Creighton offered? Won't even try.  
21 That's his standard. That's the problem with his standard.  
22 And it's certainly not what the law requires, as you know,  
23 from your jury instructions.

24 So, what is the law?

25 Well, this is not a case where the medical school didn't

1 admit Mr. Argenyi. They clearly thought he was a bright  
2 student. They admitted him. They were excited to have him.  
3 You heard Dr. Kavan. This helped the diversity of the medical  
4 school. They were excited because he was an accomplished  
5 person. They wanted him there. It's not about that.

6 This isn't about a case where Creighton kicked him out  
7 because of his disability. Again, the opposite. He  
8 successfully completed his first two years of medical school;  
9 well on his way to becoming a doctor.

10 This case is about whether Creighton provided additional  
11 services that it doesn't provide to other students; additional  
12 auxiliary aids and services that are necessary because of his  
13 disability to ensure meaningful access.

14 Now, I've been doing this for a while. And a long time  
15 ago somebody was talking to me about providing accommodations  
16 and providing auxiliary aids for persons with disabilities.  
17 And they said, I look at it this way: A track -- track and  
18 field, the 400-meter race. Now, in the 400-meter race, not  
19 everybody starts on the same line, right? It's a staggered  
20 start. Lane 8 looks like it's way up there, looks like they  
21 get a head start but they don't because lane 8 is longer. So  
22 you've got to get a staggered start.

23 And that's what this law is about. If a person with a  
24 disability needs an equal opportunity to get to the finish  
25 line, they need to start at the same distance.

1           It doesn't require that they get to go run ten yards  
2       before the gun goes off. It doesn't give them roller skates  
3       or a jet pack. It gives them an equal opportunity to get  
4       around.

5           What Mr. Argenyi is telling you is: I have a disability,  
6       so you have to give me everything I demand. You can only rely  
7       on me.

8           But, Mr. Argenyi wants to maximize his educational  
9       results. I get that. He's a smart, competitive overachiever,  
10      we know that. And he wants to maximize the results of his  
11      education. He wants to get everything he can to maximize  
12      those results.

13          But that's not what the law requires. It's a balancing.  
14      It is, number one, first you have to show you need it for the  
15      disability. And secondly, is it reasonable, is it an undue  
16      burden?

17          It's not, I have a disability. I get everything. It  
18      would be great if we could do that. It would be great if we  
19      could do that, but we can't.

20          Congress recognized that when it passed the law. We  
21      can't provide unlimited resources because somebody wants this.  
22      We all know that. We know that in our own households.

23          Now, you're going to get instructed by the jury -- you  
24      were instructed, excuse me, and you have those jury  
25      instructions you can read when you go back. And it talks

1 about what Mr. Argenyi's burden is. And his burden is to show  
2 that Creighton failed to provide the necessary auxiliary aids  
3 and services, those that are necessary because he has a  
4 hearing impairment, to provide meaningful access.

5 Now, what meaningful access is, it doesn't require an  
6 identical result or identical level of achievement. It  
7 doesn't require maximum achievement.

8 What it requires is an equal opportunity to gain the same  
9 benefit. It doesn't require Creighton to provide something if  
10 it will just help improve his grade a few percentage points.  
11 It doesn't require Creighton to provide everything so  
12 Mr. Argenyi doesn't miss one word. It doesn't require  
13 Creighton to provide something so he's honors rather than the  
14 88 percent he got on the anatomy test. It requires an equal  
15 opportunity to gain the information; not to get every word,  
16 not to make sure he doesn't miss everything; it's an equal  
17 opportunity, not an equal result.

18 We wanted you to see everything. We tried to get all the  
19 documents in that Creighton saw, okay? The plaintiffs have  
20 introduced documents that came up afterwards or from Web sites  
21 or other things. We wanted you to see everything that the  
22 medical school saw. I told you that in opening.

23 We wanted you to hear Mr. Argenyi's story so we let him  
24 testify. We let him testify for a long time. Maybe we let  
25 him go on for too long because I appreciate the fact that you

1 guys are sitting here away from your family, friends, jobs. I  
2 know that's not easy. I get that.

3 But I appreciate you sitting there, I appreciate you  
4 deliberating. And I'm sorry if we went -- if it went on too  
5 long, but I wanted you to have all the information they had  
6 because we're not afraid of anything. We want you to see that  
7 information. We didn't want to keep anything out. We're  
8 confident if you see that information, you'll come to the same  
9 conclusion the medical school did.

10 So let's take this one at a time. Let's talk about M1  
11 first. A couple of jury instructions that I think are very  
12 important -- well, they probably all are, but we'll talk about  
13 these first.

14 Number one is you're to judge Creighton on the  
15 information that it knew or should have known at the time it  
16 made the decision. What was in front of the medical school at  
17 the time it made its decision? Not something that just came  
18 up in trial four years later; not something that Mr. Argenyi  
19 could have provided to Creighton but didn't; but what they  
20 actually had, right? Makes sense. It's fair. You don't get  
21 the gotcha later on, it's what Creighton saw at the time.

22 Number two is, as the law instructs you, Creighton has  
23 the right to require information and documentation from a  
24 third-party qualified professional. In other words, Creighton  
25 doesn't have to just take his word for it, it can require him

1 to provide that information for them to make the decision.

2 Two very important things to focus on.

3 So let's talk about what they need, okay? What did they  
4 know?

5 Well, what they knew at the time -- and I want to be -- I  
6 want to point something out that Ms. Vargas said. She said  
7 for the first time Dr. Kavan told Mr. Argenyi his admission  
8 was conditional when he asked for an accommodation. It's not  
9 true. Mr. Argenyi, on the stand, said he understood that his  
10 admittance and every other student's admittance was  
11 conditional; conditional on everybody being able to be meet  
12 the technical standards, everybody being able to pass the  
13 criminal background check, everybody passing the drug test.  
14 It wasn't just him. You heard that it was conditional for  
15 everyone.

16 But let's talk about Dr. Kavan. Dr. Kavan got on that  
17 stand, answered every question. He was not afraid to answer  
18 questions, not afraid to talk about all the documentation.

19 So what documentation did they have? Well, they  
20 certainly at that time -- before he started his M1 year, they  
21 had his demands. No question about that, right? The April  
22 e-mail sets out exactly what he wants. And as he said on the  
23 stand, from August 12th, before he started his first year  
24 until now, the demands were the same and they never changed.  
25 Never changed.

1 Dr. Kavan collected the information and tried to get the  
2 information the MEMT needed to make the decision about the  
3 accommodation. When there was some confusing, conflicting  
4 evidence, when Michael Argenyi asked for all these things but  
5 Dr. Backous only said closed-captioning on videos and a FM  
6 system and it was conflicting, did Dr. Kavan say, "Oh, we're  
7 just going to follow Dr. Backous"? No. He went out and got  
8 more information to clear up that conflict, gave Michael  
9 another opportunity to provide the information so they  
10 understood what may be required.

11 They were very deliberate. No question they were very  
12 deliberate, very deliberate in collecting all the  
13 documentation they needed, very deliberate in reviewing the  
14 information, very deliberate in making the decisions. And you  
15 have the evidence and documents in front of you that explain  
16 that. That's not deliberate indifference, that's being very  
17 deliberate to what they're required to do under the law.

18 So, in addition to his demands, Dr. Backous submitted a  
19 letter on April 10th. This was the first letter. And in that  
20 letter, as you know -- and I'm not going to pull it up again,  
21 but you can read it in the jury room -- he said he was doing  
22 quite well, had been communicating well in a nursing home  
23 environment and would benefit from closed-captioning and -- I  
24 heard in her closing, she started talking about closed-  
25 captioning, real time, and maybe trying to confuse those

1 things. We all know what closed-captioning is. Michael said  
2 what closed-captioning is, Dr. Kavan said what closed-  
3 captioning is. Closed-captioning is on videos. You can turn  
4 it -- it's open if it's turned on. What closed means is you  
5 can turn it on and off. Closed-captioning and an FM system.

6 And in the letter, this is even before he had the second  
7 cochlear implant and his communication may improve  
8 notwithstanding or regardless of any accommodations. That was  
9 it. That was it in the April 10th letter.

10 So Dr. Kavan says we need some clarification, we need  
11 more information because that conflicts with what you're  
12 asking for.

13 So the second letter comes in. This letter comes in from  
14 Stacey Watson and Dr. Backous. And it says, "Michael Argenyi  
15 went through some testing in auditory only and with visual  
16 cues and context."

17 So in addition to being in the booth not having any  
18 visual and hearing sentences, they also did the testing with  
19 visual cues and context. And what did that letter say? With  
20 visual cues and context, his performance improves to nearly  
21 100 percent. That's what Creighton knew.

22 That letter also said appropriate accommodations include  
23 an FM system -- system, an interpreter, and real-time  
24 captioning. Nowhere does it say, "You better provide all  
25 three" or, "You have to have provide all three." Nowhere in

1       that letter does it say, "You need to do provide this in a  
2       lecture, FM system doesn't work in a lecture." In fact, look  
3       in that letter. The word "lecture" doesn't appear in that  
4       letter.

5               Now, in that letter was the first and only time  
6       Mr. Argenyi was tested with visual cues and context. Look at  
7       all the other letters. All the other letters are auditory  
8       only; auditory only. Why? Why was he never tested again for  
9       visual cues and context?

10              Well, number one, that was before he got his second  
11       cochlear implant. So based upon what the expert doctors say,  
12       his communication could only improve with the second one. And  
13       you can't get better than 100 percent. You can't get better  
14       than 100 percent.

15              The reason he didn't do that testing is because the  
16       testing would have said the same thing. Instead of him  
17       hearing 100 percent, Michael just had 100 percent [sic].

18              But that's very important. Look at all those letters and  
19       you'll notice that the only time he was tested with visual  
20       cues and context was in that letter, and it was nearly 100  
21       percent. And that's what Creighton knew. That's what  
22       Creighton knew.

23              Now, Creighton also took into consideration what  
24       Mr. Argenyi said. Mr. Argenyi submitted a letter, a long  
25       letter -- and I know we've talked about it, you've seen it.

1 It will be back in the jury room.

2 And when I was talking to Dr. Kavan, we didn't go through  
3 part of that letter, we went through all of that letter. When  
4 Dr. Kavan was talking about the Dr. Backous letters, we didn't  
5 go through part of the letters, we went through each letter.  
6 And he gave the reasoning and his thoughts, what the MEMT did  
7 with it.

8 But I'm not going to read that whole letter. But clearly  
9 in that letter Michael, in his own words, says: I have been  
10 working as a CNA in the medical emergency department at  
11 Seattle Children's Hospital, I've doing procedures and helping  
12 with them and communicating with doctors and nurses and  
13 communicating with patients. And I've done all of this  
14 without any significant accommodation, with nothing but a text  
15 pager.

16 Yeah. Is a CNA different than a doctor? Of course. But  
17 it's the communication we're focusing on. We're focusing on  
18 how does Michael communicate? Can he communicate, and how  
19 does he communicate in that setting?

20 Yes, doctors are different than CNAs. But we're talking  
21 about how he communicated and how he was able to do that  
22 without any accommodation in an emergency department,  
23 communicating with patients, doctors, nurses, techs.

24 Now, also in that letter it says, "I have been able to  
25 obtain clinical information in a clinical setting without

1 significant accommodation." No CART, no interpreter; just  
2 him.

3 He also says -- and he uses the word, I want to  
4 emphasize -- not just "say", I want to emphasize that I'm not  
5 requesting accommodations for clinical -- for assistance in  
6 clinical assessment. That's his words. His words.

7 He also says -- and this is very important -- that CART  
8 and oral interpreters are interchangeable. He says that; not  
9 a doctor, not Creighton; he says that. And he ends that  
10 letter that he believes an FM system would be useful in his  
11 medical studies.

12 Now, I asked him, "Isn't it true that you said it would  
13 be useful?" "Yeah, it would be useful but not effective. I  
14 never said it would be effective."

15 That's again telling, folks. He wants to maximize the  
16 results. He doesn't want reasonable auxiliary aids and  
17 services. He doesn't want just those that are necessary. He  
18 wants everything he can get, the most technologically  
19 advanced, the most expensive. He wants that because he wants  
20 to do -- maximize the results of his education. Maximize the  
21 results. And that's a great example.

22 But that's not what's required. That's not what's  
23 required under the law.

24 The MEMT also had the letter from Amanda Mogg. You've  
25 seen it. You can see it in the jury room again. What did his

1 supervisor at Children's Hospital say? She went on and on how  
2 much he did in the ER, communicating with patients, requiring  
3 that he must work and communicate completely verbally,  
4 completely verbally with nothing but a text pager; no CART, no  
5 interpreters; just him.

6 What else did the MEMT know before they made their  
7 decision? Well, they knew that Mr. Argenyi had come to his  
8 interview and come to workshops with no CART, no interpreter,  
9 just him. Didn't request any accommodations, didn't have any  
10 accommodations.

11 So when I asked him on the stand, "Why didn't you request  
12 an interpreter for that?" "Well, I didn't want an interpreter  
13 because I wanted to build rapport with whoever was  
14 interviewing me."

15 Kind of taken aback, I said, "Don't you want to build  
16 rapport with your patients?" "Oh, that's different. That's  
17 different." Did he explain what was different? No. He just  
18 said, "That's different. That's different." Again, we're  
19 talking about his ability to communicate. And Creighton knew  
20 that at that time.

21 Now, the MEMT took all of this information. It consulted  
22 with Wade Pearson, who had been the director of the Office of  
23 Disability Accommodations for 20 years at Creighton. It sat  
24 down and it looked at all of the information. It talked about  
25 all of the information. It looked at what Mr. Argenyi said,

1 it looked at the documents he submitted, and it made a  
2 reasoned judgment.

3 And they made the reasoned judgment as medical educators  
4 and practicing physicians, knowing what medical school was.  
5 And they decided, based on those statements and the  
6 documentation that he provided, that they were going to offer  
7 him an FM system. They were going to offer him note-takers.  
8 He had access to PowerPoints. He had access to all the  
9 information in advance. And because he himself said, "With  
10 visual cues and context, I am able to get information on my  
11 own," they said, "We'll make sure there's always a seat in the  
12 front row so you can communicate that way." If the front  
13 row's full or the second row's full, if that makes you feel  
14 more comfortable, we'll make sure we save a seat for you so  
15 you don't have to sit in the back where it wouldn't be  
16 effective.

17 Now, I want you to look at instruction number 9 because  
18 instruction number 9 lists what are auxiliary aids and  
19 services. And what you're going to see in there is assistive  
20 listening devices. That's an auxiliary aid the law  
21 recognizes. That's an FM system, note-takers. That's what  
22 the law recognizes as an auxiliary aid, and they provided it.  
23 Other means that would provide him access to the information.

24 You know, they make light of the fact that we said we  
25 wanted to make sure he was close to the professor, we wanted

1 to make sure he was in the front row because that is another  
2 way to deliver that information, to make sure he has visual  
3 cues, to make sure he has context based upon what he said.

4 All of the things that Creighton Medical School offered  
5 are recognized as auxiliary aids and services by the law. Now  
6 they ran this by legal counsel, and they sent this out to  
7 Mr. Argenyi.

8 Mr. Argenyi responded by saying, "I'm going to give it a  
9 wholehearted try." His words, "wholehearted try". He worked  
10 with the medical school to pick out a specific auxiliary --  
11 excuse me, the specific FM system that would work with his  
12 cochlear implant. And Chuck Lenosky told you he worked with  
13 Stacey Watson to make sure everything worked.

14 Let's talk about Stacey Watson for a minute. Look, I get  
15 it. Stacey Watson has been working with Michael Argenyi for a  
16 long time. She is a medical professional. Her job is to get  
17 everything she can for her patient. That should be what  
18 doctors do.

19 We see that sometimes people go in, they want a  
20 handicapped parking permit or they want something else, they  
21 go in to their doctor and the doctor signs it -- maybe they  
22 don't even need it -- because doctors and medical  
23 professionals should do the most -- should do everything they  
24 can to help their patients. The Hippocratic oath, right? Do  
25 no harm. So I get it, I get she wants to be an advocate. And

1 she was an advocate on the stand.

2 On the stand, during direct examination, she said, "You  
3 know, no one from Creighton ever contacted me." Then on  
4 cross-examination when I asked about Chuck Lenosky, what did  
5 she say? She didn't say, "I never talked to him." "Well, you  
6 know, maybe I did, I just don't remember. I can't say I  
7 didn't, I just don't remember." Maybe she doesn't remember.  
8 That's okay. But she talked with Chuck Lenosky.

9 Now, I also want you to pay attention to what she said  
10 with regard to the FM system. On direct examination she said,  
11 "Yeah, the FM system, yeah, it kind of helped him pick up a  
12 few more sounds." She downplayed it. Again, it's okay, she's  
13 advocating.

14 Then we looked at her medical records, her medical  
15 records she wrote at the time they did the testing. She said,  
16 quote, the FM system was illustrated in clinic today and found  
17 to work great with his 3G and he was encouraged by the  
18 advantages the system could offer.

19 It worked great. He was encouraged. Does that sound  
20 like picking up a few sounds?

21 She also said, "He's severely and profoundly deaf, that a  
22 jet engine would have to be a few feet from him to hear that."  
23 Folks, that's without his cochlear implants. And then when I  
24 said, "What about that jet engine when he has the cochlear  
25 implants?" "Well, maybe a few more feet away." Come on. I

1 give you more credit than that, guys.

2 What did their own expert say, Dr. Thedinger, their own  
3 expert they brought in? He said without the cochlear implant,  
4 sure, he's severely and profoundly deaf. But with the  
5 cochlear implants, he's hearing impaired. That's why he gets  
6 stuff. That's why he wore the hearing aids before he got the  
7 cochlear implant.

8 You look at the jury instructions. You can judge the  
9 credibility of the witnesses. Do they say something different  
10 on the stand? Is it believable? Is it credible? That's for  
11 you to decide. But, I think Stacey Watson was an advocate,  
12 not a fact witness.

13 Now, what happens next? After the medical school and  
14 Mr. Argenyi worked together to get the FM system, Dr. Kavan  
15 was excited. Here we go, we're going to get this started.  
16 But what happens?

17 Two days. Two days before medical school starts, Dianne  
18 DeLair calls up Creighton University and demands a meeting.  
19 And it's Dianne DeLair, Mr. Argenyi, and a deaf advocate. And  
20 they say, "Michael wants what Michael wants." Not "Michael  
21 wants what Michael needs"; not "Michael needs what Michael  
22 needs"; "Michael wants what Michael wants." If that's not a  
23 threat, I don't know what is.

24 At that time he had his lawyers. He had made up his mind  
25 in that meeting that it's all or nothing, folks. You either

1 give me, Dr. Kavan, everything I want or it's not going to be  
2 enough. This is the wholehearted try, right? At that  
3 meeting, however, no CART, no interpreter, just him.

4 I want you to do one thing. I want you to look at the  
5 statements that Michael made and the statements his team made  
6 before he got lawyers and after he got lawyers.

7 The two letters from Dr. Backous and Stacey Watson were  
8 enough documentation for the MEMT to make the decision. They  
9 had enough information at that point. They didn't ask for two  
10 more letters from Dr. Backous. Mr. Argenyi's lawyer asked  
11 Dr. Backous and Stacey Watson to write two more letters. They  
12 didn't need any more. They had enough information at that  
13 point. So compare what was said before lawyers and what was  
14 said after lawyers.

15 Now they said Creighton University doesn't want to talk  
16 about the e-mail that Michael sent on September 1st. Because  
17 what we know is Michael started class, and two weeks later he  
18 sent an e-mail -- that, by the way, was cc'ed to his lawyer.  
19 Sent it to Dr. Kavan. We don't want to talk about it. We  
20 talked about it. We want to talk about it.

21 Let's talk about that e-mail. First of all, let's talk  
22 about the credibility of that e-mail when Michael himself  
23 said, "Before I started class, I knew nothing less than  
24 everything I wanted was going to be enough. I knew at that  
25 point."

1           So let's look at the credibility of that e-mail after he  
2           says that on the stand in front of you. Let's look at the  
3           credibility when his lawyer is cc'ed on it. You have to make  
4           that decision. Let's look at the fact that he smiled and he  
5           couldn't even take it seriously with regard to his  
6           wholehearted try.

7           But beyond that, the medical school took that e-mail  
8           seriously, very seriously. And Mr. Argenyi pointed out three  
9           specific problems he was having. Number one, the FM system in  
10          the anatomy lab because of the background noise. There is  
11          background noise in anatomy lab. There's sawing and other  
12          stuff that kind of grosses me out a little bit on cadavers,  
13          but there is a lot of background noise in the anatomy lab.

14          Number two, closed-captioning on videos. One of the  
15          videos was not closed-captioned.

16          And number three, the note-takers in the note-taking  
17          service pool were not getting him the notes fast enough.

18          It's important to point out that before that, the medical  
19          school had offered him individualized note-takers of his  
20          choice. But as you heard, he wasn't particularly impressed  
21          with any of his fellow students. He didn't think that would  
22          be good. That wasn't enough.

23          And what did Dr. Kavan do? He addressed every single one  
24          of those issues. The anatomy lab: Talked to Dr. Quinn.  
25          Dr. Quinn, who is the anatomy professor who teaches the

1 professor [sic], moved him into the center room right by him  
2 so he could have that individual one-on-one communication  
3 right at the cadaver table.

4 Number two, assigned their best teaching assistant to  
5 assist Michael in communicating. They said in opening  
6 statement Creighton didn't even respond. That's not true.  
7 It's not true. And then at trial, they said, "Well, Dr. Kavan  
8 didn't respond because it was Dr. Quinn." Come on.

9 With regard to the closed-captioning, not only did  
10 Dr. Kavan say they addressed it, he was miffed because this  
11 had been discussed before class starts, it should have been  
12 done already. He took it very seriously to work to get those  
13 closed-captioned. And with the note-takers, again he had been  
14 offered the individualized note-taker he admitted he didn't  
15 take advantage of, and Dr. Kavan reminded him that he could do  
16 that and help with the note-taking service.

17 Now, folks, what else did they know at that time?  
18 Because in addition to that e-mail, there were a couple  
19 letters from Dr. Backous and Stacey Watson.

20 Again, look at those letters. One of them refers back to  
21 the May letter where he had 100 percent communication; and the  
22 next letter was auditory only testing. Didn't do it with  
23 visual cues and context. There was nothing new in those  
24 Backous and Stacey Watson letters that the lawyers asked them  
25 to write.

1           What else did they know at that time? Well, first of  
2 all, he included a broad statement, "I'm fatigued and stressed  
3 and missing a big chunk of information."

4           Now, Mr. Argenyi assumed that's because he wasn't getting  
5 everything he wanted. The statement he made in that e-mail,  
6 Dr. Kavan told you, he hears from medical students all the  
7 time. Even Mr. Argenyi said it's like trying to take a drink  
8 of water out of a fire hydrant. These kids are overachievers.  
9 Well, they're used to it being easy. And they get in the  
10 environment that's really hard, yes, they'll be stressed and  
11 fatigued. On the LCME accreditation what they're concerned  
12 about is too much stress for all medical students. There is  
13 no way to differentiate that from what any other student was  
14 suffering from.

15           But what else did they know? They knew his grades. They  
16 knew his grades. And you heard Dr. Kavan talk about what his  
17 grades were before he got interpreters and CART. 88 percent  
18 on anatomy exams; doing well in anatomy; doing well in MCDE.  
19 And after he got CART and interpreters for himself, he did a  
20 little bit better in some classes and worse in others.

21           Now, contrast that with "I'm close to failing" like he  
22 said. "He was close to failing," like his mom said. Don't  
23 you think if he was close to failing, they would want to get  
24 the grades in front of you? Doesn't add up. Doesn't add up.  
25 We wanted you to see the grades because that's the way you

1 determine how someone is doing in school, their grades.

2 MS. VARGAS: Objection, your Honor. Mr. Moore -- may  
3 we have a sidebar?

4 THE COURT: All right.

5 (Bench conference on the record.)

6 MS. VARGAS: Mr. Moore just told the jury about  
7 evidence that was not admissible because it wasn't competent.  
8 And he made the point that it wasn't admitted because we were  
9 somehow trying to hide it.

10 It was the Court that ruled it was not competent evidence  
11 to put before the jury and sustained our objection. And  
12 Mr. Moore just improperly made the point about evidence that  
13 the jury didn't get to see because we tried to keep it out.  
14 That's improper in closing argument.

15 MR. MOORE: Dr. Kavan testified to everything I said.  
16 He testified to the grade in anatomy. He also testified that  
17 he did better in some classes without -- better in some  
18 classes and worse in some classes with. That's all testimony  
19 that was in. And we wanted to get that in front of them. I  
20 just asked if the plaintiff was failing, then why didn't he  
21 offer the grades.

22 MS. VARGAS: That isn't what I objected to. I  
23 objected to the fact that you were commenting on the fact that  
24 evidence wasn't admitted into court as somehow --

25 MR. MOORE: I did not.

1 MS. VARGAS: -- that somehow -- that's improper.

2 THE COURT: There was evidence that came in about  
3 plaintiff's grades.

4 MS. VARGAS: He was talking about the evidence that  
5 didn't come in.

6 THE COURT: No, I didn't interpret it that way. I  
7 understand how you might interpret it that way. But I will  
8 tell you what I heard and how I interpreted it. Evidence did  
9 come in regarding the plaintiff's grades -- some evidence did  
10 not come in. That's true.

11 And the evidence that was admitted regarding the  
12 plaintiff's grades was offered through the defense, through  
13 the presentation of the defendant's case. It was not offered  
14 in connection with the presentation of the plaintiff's case.  
15 And I think that's all that counsel has said.

16 MS. VARGAS: Your Honor, I maintain my objection,  
17 that when he was referring to the fact about the evidence that  
18 didn't come in, and it's improper to cast aspersions on  
19 evidence that didn't come in because it didn't come in for a  
20 reason. Your Honor ruled that it shouldn't come in.

21 And for him to make suggestions that that somehow would  
22 cast aspersions on us is totally improper in a closing  
23 argument.

24 THE COURT: And I can understand how you might  
25 interpret his statements to mean that and because that's what

1 he was referring to which would be improper.

2 But I'll give him the benefit of the doubt that he was  
3 referring to the evidence as I have earlier described here, so  
4 we'll move on.

5 (End of bench conference.)

6 THE COURT: You may proceed.

7 MR. MOORE: As I mentioned, Dr. Kavan told you that  
8 the grades were good and that some grades after he got the  
9 CART and interpreters were worse. The grades are what we had,  
10 folks. That's how a student is measured. That's an objective  
11 way to look at this.

12 Now, they say, "Don't pay attention to the grades." They  
13 make this argument that every time he was successful without  
14 auxiliary aids and services or using what Creighton offered,  
15 that it was an easy part of medical school. That was the easy  
16 part. That's why he did well.

17 But every time he was using CART and interpreters,  
18 apparently medical school got -- there was no problem. But,  
19 you know, if they were only using what Creighton offered, that  
20 it was an easy part of medical school. You be the judge of  
21 that.

22 Now, there was no question, you have seen what the  
23 medical school knew before M1. And it's based upon what they  
24 knew. And based upon what they knew, they offered the  
25 appropriate auxiliary aids and services that Mr. Argenyi

1 refused to even try.

2 Let's talk about M2. What did Creighton know before M2?

3 Well, other than the letter from Dr. Thedinger, they had  
4 all the other information from the previous year and what  
5 Mr. Argenyi's conduct was. But he didn't offer any new  
6 evidence -- or new documentation.

7 Let's talk about the Dr. Thedinger letter just for a  
8 minute. In opening statement, I believe one of the questions  
9 they needed to answer was why did they wait to present the  
10 documentation from a qualified professional, which Creighton  
11 is allowed to ask under the law, why did they wait until after  
12 the M1 year? Why did they wait?

13 I asked Mr. Argenyi, "Could you have gotten it done  
14 before M1?" "Yes." "Could you have gotten it done during  
15 M1?" "Yeah." So why did they wait? They never answered that  
16 question. Was it a legal strategy? Was it a gotcha? Because  
17 the lawyers were certainly involved at that time. I don't  
18 know, they didn't answer.

19 And now today in closing they say well, they could  
20 have -- they could have sent him to one of Creighton's  
21 doctors. Can you imagine if they would have asked him to go  
22 to one of Creighton's doctors? Oh, that's just out of line;  
23 that's unfair. The law doesn't require Creighton to send him  
24 to a doctor. The law requires Mr. Argenyi to provide support  
25 for what he's requesting.

1           And let's talk about Dr. Thedinger's letter because  
2           Dr. Thedinger's letter shows how the law works and how  
3           Creighton Medical School followed the law. Once they had  
4           documentation from a qualified professional, they reassessed  
5           what they were offering and they changed and offered him more.  
6           That's exactly how the law is supposed to work.

7           Once the person, who is asking for the benefits other  
8           students don't get, provides an appropriate document,  
9           professional documentation as you see in the jury  
10          instructions, they made the change.

11          And they offered him oral interpreters. Why did they  
12          offer him oral interpreters? Well, there's a couple reasons.  
13          Number one is by Mr. Argenyi's own words oral interpreters and  
14          CART are interchangeable. And I asked him to point to any  
15          evidence in the record, any evidence in the record where  
16          Mr. Argenyi said oral interpreters were not effective in  
17          lecture.

18          There's not a letter, there's not an e-mail, there's not  
19          a phone call, there's not an in-person, there's not a doctor's  
20          note or recommendation. Nowhere in this record did he tell  
21          Creighton Medical School at that time that an oral interpreter  
22          was ineffective. The first time he said it was in this trial  
23          three years later.

24          Gotcha.

25          That's not what the law requires. The law requires

1 Mr. Argenyi to provide the information so they can make the  
2 decision based upon the information at that time, not what you  
3 learn three years later.

4 So why not CART? Why not CART?

5 Well, the law says that Creighton gets to choose between  
6 two equally effective forms of communication when they're  
7 interchangeable.

8 Now, let's talk about their numbers. First of all, their  
9 expert, Margaret Tyska Heaney, testified she charged \$95 an  
10 hour. That's what she charged. That's the actual charge.  
11 She also said, what, for each hour of class time, there's an  
12 hour of prep time at \$50 an hour. That's \$145 an hour, folks,  
13 for class time.

14 But even if we buy -- even if we take that estimate that  
15 Creighton had the year before, that it might be around \$75,  
16 let's just take \$75; \$75 plus \$50 prep time is \$125 an hour.

17 Number two, when Mr. Argenyi was on the stand and when  
18 Dr. Townley testified, what did you hear? Michael Argenyi had  
19 one interpreter; not two, one; one interpreter, which would  
20 have been \$40 an hour as compared to, even accepting their  
21 numbers, 125.

22 Even if he had two, that's \$125 using their numbers  
23 compared to 80. Can Creighton make that decision to provide  
24 the less expensive one? Absolutely they can. And they did.  
25 Read the -- the jury instructions will tell you. Creighton

1 ultimately gets to make that decision. And this is why: So  
2 they cannot spend 125 or \$145 an hour, they can spend 40 or  
3 \$80 an hour. That's why they made that decision.

4 And they also made the decision because Mr. Argenyi  
5 himself said oral interpreters are interchangeable. And  
6 there's no evidence, nothing, that Creighton had that said it  
7 wasn't.

8 Let's talk about longitudinal clinic because that was the  
9 second change, right, the new class in M2. Let's talk about  
10 longitudinal clinic.

11 Again, Creighton had all the information that Mr. Argenyi  
12 had provided, how he did well with clinical assessment, that  
13 he did clinical assessment, he got clinical information  
14 without any accommodation in the past. Yes, they had that.

15 But they also had the OSCEs. Now, folks, we've talked a  
16 lot over this two weeks. We've argued, they've argued,  
17 everybody's talked a lot about could have, would have, should  
18 have; maybe this could have.

19 But the OSCEs are unvarnished. The OSCEs aren't what  
20 deaf people might hear or what hearing impairment might hear  
21 or what this test might show. It is Michael Argenyi in a  
22 clinical setting.

23 Yes, the audio has poor quality. Okay, yeah. Chuck  
24 Lenosky says they have to replace it because it wasn't very  
25 good, right? The audio doesn't match up.

1 But that has no impact on viewing Mr. Argenyi and seeing  
2 him do very well in that clinical setting. Again we wanted  
3 you to see everything; they wanted you to see with an  
4 interpreter and without an interpreter.

5 We wanted you to see that, and we want you to watch it  
6 again, if you want to, in the jury room because it shows that  
7 Michael Argenyi does just as well with or without an  
8 interpreter. And again, remember it's not maximizing -- the  
9 best he can possibly do, the best possible result, that's not  
10 what's required. It's effective communication. It's a  
11 balancing.

12 I know they want it, I know they want everything. But  
13 that's not what the law requires.

14 Now, he starts sending these e-mails, and I want to talk  
15 about these e-mails to Dr. Hansen. He sends, I think, four or  
16 five of them.

17 He knows at that point that the lawyers are discussing  
18 the accommodations. Dianne DeLair had sent the letter, I had  
19 responded, it was going through counsel. Okay?

20 We had been in litigation for a year. One of the e-mails  
21 that was sent was just, like, a week before they were going to  
22 depose Dr. Hansen. So why did he send those e-mails? If he  
23 knew he didn't need to, why did he send them?

24 Well, I would surmise that when Ms. Vargas got up there  
25 dramatically putting up all those letters, that's exactly what

1 they wanted today. They wanted to create a paper trail. They  
2 wanted to create a paper trail. The more Mr. Argenyi went on  
3 and on and on about what he claimed was the problem, the more  
4 we get in front of the jury. That's the paper trail, folks.

5 But there was no information from anyone but Mr. Argenyi  
6 in the midst of litigation when they're deposing Dr. Hansen.  
7 A paper trail. When he knew the lawyers were communicating.  
8 Why did he send them? For that moment. Right there in front  
9 of the jury; right there in front of you.

10 And why didn't Dr. Hansen respond in addition to the fact  
11 that the lawyers were talking? Because he was talking to  
12 Dr. Townley at the same time, the preceptor, who was saying,  
13 "He's doing just as well as any other student." You saw the  
14 evaluations. The evaluations will be back with you where  
15 Dr. Townley says he does just as well with or without an  
16 interpreter.

17 So, like the grades, the evaluations, something doesn't  
18 add up. Something don't add up.

19 Remember, this is education. This is how he's doing in  
20 medical school. Not to maximize his result, not to get  
21 honors; it's how is he being evaluated, how is he doing in  
22 school? Grades and evaluations, folks. That's why Dr. Hansen  
23 didn't respond, because it didn't add up.

24 Now, folks, he also said a couple things, that Creighton  
25 wouldn't provide him interpreters even if he paid for them

1 himself.

2 Again, I give you more credit than that. He was in  
3 litigation, and what did he say? "I would have just added it  
4 on to the tab in the lawsuit." That's what he wanted to do.  
5 He wanted to get in there and have interpreters, not being  
6 able to evaluate him without interpreters, pay for them  
7 himself, and then send the bill to Creighton.

8 He also says -- or the plaintiff's team also said  
9 Creighton wouldn't spend one dollar, one dollar. Folks,  
10 that's not true. Creighton spent thousands of dollars to put  
11 in the FM system. Creighton paid for interpreters that  
12 Michael Argenyi used during his M2 for the lab. It wasn't  
13 just in lectures, they offered in some labs interpreters.  
14 Michael Argenyi used interpreters and submitted the bill to  
15 Creighton, and Creighton paid it. Creighton actually was  
16 willing to spend money on those auxiliary aids and services  
17 that were necessary, that he would at least try.

18 Now, let's talk about the loan. He talked a lot about  
19 that loan. And then we learned -- and they still haven't said  
20 it, but we point it out, the loan was from his parents. The  
21 loan was from his parents. And the loan was taken out after  
22 the lawsuit was filed. And his parents are charging him 8  
23 percent interest. Do you not think the parents thought,  
24 "We're just going to get this back in litigation; got a  
25 guaranteed return of 8 percent."

1           How necessary would these have been if Michael didn't  
2           have the same parents and he had to take out a loan from a  
3           bank that he definitely had to pay back? How necessary would  
4           they have been then?

5           They also said we're going to show you that Creighton  
6           said he can pass just by showing up. Michael Argenyi said --  
7           he said, "Well, yeah, Creighton told me I could pass by just  
8           showing up." He failed to identify who said that and you  
9           heard Dr. Townley: Not in my class. Not in my class.

10          They also promised you that we'll show you that Creighton  
11          never tried to contact Dr. Backous or Stacey Watson. Not  
12          true. Chuck Lenosky called Stacey Watson and Amy Bones called  
13          Dr. Backous, and he didn't even call her back.

14          Gotcha.

15          That's what they're trying to do, folks.

16          Now, we never heard anything about this white coat  
17          ceremony. There was no evidence about any white coat  
18          ceremony. Then they go on and on how there were no  
19          accommodations there. The white coat is a ceremony, it's not  
20          class. He hadn't started class. And he didn't request any  
21          accommodations for the white coat ceremony; no CART, no  
22          interpreter, just him.

23          Let's talk about undue burden. You were instructed that  
24          even if he proves they're necessary -- which the evidence  
25          certainly doesn't show that -- that Creighton does not have to

1 provide these if it's an undue burden. An undue burden, which  
2 is a significant -- let's read it. I want to make sure I get  
3 this right: Which is a significant difficulty or expense; a  
4 significant expense.

5 Well, we know what he paid. We know what he's asking  
6 for. Creighton would have had to pay \$110,000 for his  
7 auxiliary aids and services for his first two years, which, by  
8 the way, is \$15,800 more than he paid in tuition.

9 The other factors -- in addition to the nature and the  
10 cost, the other factors are the financial resources of the  
11 medical school. You heard the medical school doesn't get  
12 money from the university; the medical school pays money to  
13 the university. And you heard they have two choices if they  
14 spent this kind of money, cut services for students or jobs or  
15 raise tuition.

16 Look at the jury instructions. That's what you take into  
17 consideration. Now Creighton is not some big corporation  
18 that's trying to make money for its shareholders or overpaid  
19 CEO. That's not what it is. Creighton University is a  
20 nonprofit educational institution that every dollar goes back  
21 into the school to try to make it better, to try to make it a  
22 shining star.

23 Nobody's getting -- no CEO is getting paid, no  
24 shareholder is getting paid; every dollar goes back in.

25 Folks, if \$110,000 for one student to provide

1 accommodations that he can't establish that he needs, that he  
2 says, "I have a disability, you've got to pay it," if that's  
3 not a significant expense, I don't know what is.

4 Requiring Creighton to pay that kind of money, based upon  
5 the documentation and his own statements and his own  
6 physician's statements, paying \$110,000 when that evidence is  
7 before them, when he wants to use it to maximize the results?  
8 That's an undue burden, folks; an undue burden.

9 Now I'm just going to talk briefly about intentional  
10 discrimination because you'll have to find that they were  
11 necessary and it wasn't an undue burden. If you find both  
12 those things, you have to decide if there's intentional  
13 discrimination; that Dr. Kavan, that Creighton Medical School  
14 had an intent to discriminate against him.

15 And you'll look at the jury instructions that the  
16 university believed it was a strong likelihood that its  
17 conduct violated the ADA or Rehabilitation Act. That there  
18 was a strong likelihood they said, "Yeah, we know it's against  
19 the law but we're going to do it anyway."

20 The MEMT is set up to comply with the law. They have  
21 processes and procedures because they take that law seriously.  
22 They have forms, they have committees, they have Wade Pearson  
23 because they take it very seriously. They've given  
24 accommodations and dealt with that before Mr. Argenyi and  
25 they're going to deal with it after.

1           There's no intentional discrimination. Sure, they were  
2           very deliberate, but they were deliberate in getting  
3           information from Mr. Argenyi and documentation to make sure  
4           they made the right decision. And they did.

5           It's not intentional discrimination. There's no intent  
6           to discriminate against Mr. Argenyi. In fact, not only did  
7           Wade Pearson help, they also ran it by their legal counsel  
8           because they were concerned about complying with the law.  
9           That's why the MEMT was there.

10           This isn't anything where they said, "Yeah, Dr. Kavan --  
11           nah, we're not going to give it to him." That's not what  
12           happened. You heard Dr. Kavan testify, you heard Dr. Hansen  
13           testify, you heard Wade Pearson testify. They wanted to do  
14           the right thing. And they did do the right thing here.

15           In fact, as we talked about when they received  
16           Dr. Thedinger's letter, they changed the accommodations  
17           because he provided documentation that we don't know why he  
18           waited a year for, but they took it into consideration, they  
19           thought about it, what's best for Mr. Argenyi in the medical  
20           school setting, and they made that decision.

21           Sure, there's -- there's no evidence of intentional  
22           discrimination.

23           Now, I'm not sure as I sit here -- and I've sat here for  
24           a long time, you've sat here for a long time. I've been with  
25           this case for a long time, and I'm not sure what it's about.

1 I'm not sure what it's about.

2 Mr. Argenyi believed he was entitled. He talked about  
3 his commitment to social jurisprudence. He found lawyers from  
4 the National Association of the Deaf and Disability Rights  
5 Nebraska. He found advocates.

6 And then I think this case became about more than  
7 Mr. Argenyi. Look around the courtroom. And it really struck  
8 me when Ms. Vargas stood up for the first time to talk to you  
9 and there are four lawyers over there, I think. And she  
10 introduced the lawyers from the National Association of the  
11 Deaf; she introduced the lawyers from the Nebraska Disability  
12 Rights, and she had to be reminded to introduce Mr. Argenyi.

13 This has become about something other than Mr. Argenyi,  
14 but it's not. It's not about all deaf people. It's not  
15 about -- it's not about maybe their desire to set this  
16 standard; the person who is hearing impaired comes in and gets  
17 everything they want. They may want to do that, but that's  
18 not what this case is about. It's about Mr. Argenyi and what  
19 he needs.

20 Now, folks, at the beginning -- well, one more thing.  
21 One more.

22 We could leave this courtroom today and have to go to the  
23 Westroads. We could go outside and get in my 2004 Jeep  
24 Cherokee. We can drive it up Dodge Street, and we can park  
25 and go in and go shopping.

1           We could also leave and get into a Porsche. We could  
2           drive that Porsche up Dodge Street. And you know what, if I  
3           did that, I'd feel a lot better. I'd feel more confident.  
4           I'd look good. I'd be maximizing my experience. But that  
5           Grand Cherokee got me to the Westroads just as easy as a  
6           Porsche would. Mr. Argenyi wouldn't even get in the Cherokee.  
7           He wants the Porsche without even trying the Cherokee.

8           Now, folks, I told you when I came up here that I was  
9           going to ask you to enter a verdict in favor of Creighton  
10          University because I strongly believe, I'm confident that the  
11          evidence shows that they met their obligation under the ADA  
12          and under the Rehabilitation Act. And I'm going to ask you  
13          that.

14          I'm going to ask you, as Ms. Balus will show you, to  
15          check that Mr. Argenyi has not met his burden. And I'm going  
16          to ask you on question number 3 to enter a verdict in favor of  
17          Creighton. Write it out right there.

18          Because I think the evidence is very clear that Creighton  
19          Medical School offered him the auxiliary aids and services  
20          that were necessary for him to have access to his medical  
21          education. And certainly we can't sit here today and say  
22          Creighton violated a disability rights law because Mr. Argenyi  
23          refused to even try what they offered.

24          We believe the evidence shows that Creighton did not  
25          violate the ADA or Rehab Act, and we ask for a verdict in

1 their favor.

2 Thank you.

3 THE COURT: Thank you, Mr. Moore.

4 We will now hear rebuttal, Ms. Vargas.

5 MS. VARGAS: Thank you, your Honor.

6 The truth matters. The truth matters.

7 Mr. Moore just got up here and told you: No idea why  
8 Michael would have sent letters from his doctor in September  
9 2009. It must be because he got lawyers. It must be that the  
10 nonprofit lawyers from the National Association of the Deaf  
11 and Disability Rights Nebraska charged by the State of  
12 Nebraska with representing the rights of its citizens with  
13 disabilities -- it must be because they were playing gotcha.

14 I'd ask you to look at this letter from Amy Bones, who  
15 has not been in this courtroom, who was the general counsel  
16 form Creighton University. She sent this letter in September  
17 to Dianne. And what you've seen of Dianne, does she seem like  
18 the kind of person that plays gotcha?

19 This letter asks for more documentation. That is why the  
20 medical letters were provided.

21 The truth matters.

22 Mr. Moore told you that they had Wade Pearson on the  
23 MEMT. And you know what? I think Wade Pearson's a great guy.  
24 I think Wade Pearson probably did his job very well in the  
25 Office of Disability Services. Wade Pearson was not on the

1 MEMT committee ever. He was not allowed to vote. Wade  
2 Pearson, in his time working in the Office of Disability  
3 Services, provided exactly the auxiliary aids that Mr. Argenyi  
4 asked for to other students. But not in the medical school.

5 They talk about how there's not documentation? The truth  
6 matters.

7 Dr. Hansen came into this courtroom and testified under  
8 oath before the beginning of the M2 year, the second year of  
9 medical school, in this room, he testified under oath. And I  
10 put his testimony up on the monitor we've been calling the  
11 ELMO so you could see it. And in that sworn testimony in  
12 August of 2010, Dr. Hansen told Michael, in front of the  
13 Court, "If you have any struggles in the clinic, come to me.  
14 I'll help you. Come talk to me. Come tell me." And that's  
15 what he did. And now that wasn't the right thing? That  
16 wasn't what he was supposed to do?

17 The truth matters.

18 We're not talking about a parking spot. We're talking  
19 about access to an education. We're talking about access to  
20 the words. If you don't have access to the words that are in  
21 the classroom, you don't have access to the education. It's  
22 that simple.

23 Read the letters. Read all of the letters. Read them in  
24 context, where Mr. Argenyi said generally interpreters and  
25 CART are interchangeable. Look at the paragraph immediately

1 above that with an underlined heading that says specifically,  
2 not generally, but specifically what he needed.

3 When my children get in trouble for doing something --  
4 which is usually when I'm on the phone -- especially my  
5 littlest, and it usually involves eating candy he wasn't  
6 supposed to have; and I ask him about it -- he just turned  
7 6 -- and he says, "Well, I didn't eat it right now." It  
8 wasn't right now, it was when I was on the phone. A cute  
9 answer, from a five-year-old.

10 It's not so cute when it's from a multimillion dollar  
11 university that has accepted millions and millions and  
12 millions of federal tax dollars conditioned on a promise.  
13 That promise was already made, 408 times in 2010. 408 times  
14 they signed a document called an Assurance of Compliance form  
15 that said they would not discriminate on the basis of  
16 disability; that said they would comply with the  
17 Rehabilitation Act. Ms. Madsen, vice president of finance,  
18 oh, didn't know anything about that.

19 And let's talk about being able to review the evidence.  
20 Remember, it's not a coincidence that you were given access to  
21 some OSCE videos. The rest of the OSCE videos? The equipment  
22 malfunctioned. On multiple different days, it just happened  
23 to malfunction when Michael was in the clinic; when Michael  
24 was going for testing. Just happened to malfunction.

25 Let's talk about the fact that the evaluation that

1 Creighton produced for the first time; that was never given to  
2 Michael. And you know what? When Dr. Townley testified and  
3 she said, "In my clinic a student wouldn't be told he passed  
4 just for showing up in my clinic," she doesn't grade the  
5 students in the clinic. She's not the one who grades them.

6 The truth matters.

7 And you have the opportunity, after four years, to decide  
8 whether this young man gets to be a doctor. That decision is  
9 in your hands.

10 THE COURT: Thank you, Ms. Vargas.

11 We will now turn to the final jury instruction, number  
12 18.

13 (Instruction number 18 read.)

14 THE COURT: Thank you for your attention. You will  
15 decide your schedule. You will decide if you want to take a  
16 lunch break, which is probably a good idea at this juncture,  
17 get some food, and then begin your deliberations after lunch,  
18 if you wish.

19 So you are now excused to the jury room. Thank you.

20 (Jury out at 12:31 p.m.)

21 THE COURT: Please be seated.

22 As we discussed earlier, we will be in touch if there is  
23 a question from the jury or if there is a verdict. So please  
24 be sure that Ms. Frahm has the telephone number at which you  
25 want to be called in the event that either one of those things

1 happens.

2 I do want to thank the lawyers in this case for your very  
3 thorough preparation over the last four years. I know it's  
4 been a very, very long time that you've all worked on this  
5 case, and you've worked very hard. And it's fair to say that  
6 both parties in this case could not have had finer  
7 representation. So I appreciate that, and I appreciate your  
8 courtesy to the Court and our staff.

9 And we will be in touch. Thank you.

10 (Judge leaves the bench at 12:33 p.m.)

11 (At 12:44 p.m. following record made:)

12 COURTROOM DEPUTY: Okay. We're on the record.  
13 Counsel introduce yourself.

14 MS. VARGAS: My name is Mary Vargas. I represent the  
15 plaintiff, along with Dianne DeLair.

16 MS. BALUS: Allison Balus on behalf of Creighton  
17 University.

18 COURTROOM DEPUTY: Okay. We have gone over -- we  
19 have looked at every exhibit, we've checked the numbers  
20 against the exhibit list.

21 Counsel for the plaintiff, do you agree that all the  
22 exhibits on the exhibit list are here and you've looked at  
23 them?

24 MS. VARGAS: Yes.

25 COURTROOM DEPUTY: And you agree these should all go

1 to the jury?

2 MS. VARGAS: I do, with the exception of 209A and B1  
3 which I've asked for the opportunity to review, and defense  
4 counsel is going to review with me.

5 MS. BALUS: We didn't change 209B at all. There was  
6 nothing you guys asked to have cut off.

7 COURTROOM DEPUTY: Counsel for the defendant, do you  
8 agree we have looked at every exhibit, gone through them  
9 individually, they all agree with what's on the exhibit list,  
10 and this is what should go to the jury.

11 MS. BALUS: I do.

12 COURTROOM DEPUTY: Okay. Thank you.

13

14 (Adjourned at 12:45 p.m.)

15

16

17

18 I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

19

20 /s Brenda L. Fauber  
Brenda L. Fauber, RDR, CRR

21

22

23

24

25

7-21-14

Date